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No. 80-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Illinois Central Gulf Railroad Company,

Petitioner,

v.

City of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, K-F Motors, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, L. C. Burkhalter and M. S. Stuckey,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

This case involves an application which petitioner Illinois Gulf Central Railroad ("ICG")[1] filed with the Interstate Commerce Commission ("Commission") in December 1977, seeking authority to abandon one of its lines. The Administrative Law Judge ("ALJ") to whom petitioner's application was referred recommended that the application be denied. The ALJ's recommendation was based primarily on two findings: (1) train and engine crew wages paid by ICG on the line were found not to be "avoidable costs" to be considered in determining the profitability of the line, and, when such costs were excluded, the line showed a profit; and (2) the alleged burdens which abandonment of the line would impose on shippers and on communities along the line outweighed the burden which continued operation of the line would impose on ICG and on interstate commerce, and the public convenience and necessity therefore did not permit abandonment.

On appeal, a panel of the Commission rejected the recommendation of the ALJ and granted the railroad's application, holding that the wages in question were "avoidable costs" and that the burden to ICG and to interstate commerce of continued operation outweighed any burden which abandonment would impose on

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[1]Petitioner Illinois Central Gulf Railroad Company ("ICG") is a wholly owned subsidiary of I. C. Industries. ICG itself is the parent company of several subsidiaries, all of which are wholly-owned. ICG also has a minor interest in several railroad terminal companies, none of which are publicly held and none of which are parent companies, subsidiaries, or affiliates of ICG.

I. C. Industries, the parent company of ICG, is also the parent of the following additional companies: Centigen, Inc.; Endro, Inc.; Haleyville Tubes, Inc.; IC Equipment Leasing Company; IC Leasing, Inc.; IC Products Company; IC Sub. Inc.; Iconic, Inc.; Illinois Center Corporation; Illinois Central Industries, Inc.; LaSalle Properties, Inc.; Lincoln Financial, Inc.; Mid-America Improvement Corporation; Pepsi-Cola Bottling Company of Kenosha and Racine, Inc.; Pet Incorporated (Delaware); H.F. Philipsborn & Co.; Philipsborn Equities, Inc. (Delaware); and South Properties, Inc.

shippers and communities. The full Commission affirmed the decision of its panel.

A divided panel of the Court of Appeals reversed and remanded the Commission's decision. The majority of the panel ruled (after comparing the analysis of the ALJ with that of the Commission) that the ALJ was correct—and the Commission wrong—on both issues.

The questions presented are:

1. Whether, in determining that the crew wages at issue were not "avoidable costs," (a) the Court of Appeals violated the Administrative Procedure Act and the principles set forth by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955), by comparing and choosing between the analyses of the Commission and the ALJ; (b) the Court of Appeals acted contrary to decisions of other courts of appeals, the Commission's regulations, and the evidence of record.

2. Whether, in reviewing the Commission's balancing of the interests of all parties in its determination of the "public convenience and necessity," (a) the Court of Appeals violated the Administrative Procedure Act and the principles set forth in *Universal Camera* and *Allentown* by comparing and choosing between the analyses of the Commission and the ALJ; (b) the Court of Appeals substituted its view of a proper balance for that of the Commission, contrary to the decisions of this Court in *Colorado* v. *United States*, 271 U.S. 153 (1926), and in *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, ___ U.S. ___, 101 S.Ct. 1124 (1981).[2]

[2]All of the parties to the review proceeding in the Court of Appeals are listed in the caption of this case with the exception of the Interstate Commerce Commission and the United States of America. In the review proceedings in the Court of Appeals below, respondents City of Cherokee, *et al.* were petitioners, the Commission and the United States were respondents, and petitioner Illinois Gulf Central Railroad Company was intervenor-respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Illinois Gulf Central Railroad Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 12, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 641 F.2d 1220 (App. A). The opinion of the Interstate Commerce Commission is reported at 363 I.C.C. 93 (App. D). The opinion of Division 1 of the Commission is unreported (App. E). The opinion of the Administrative Law Judge of the Interstate Commerce Commission is unreported (App. F).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 12, 1981 (App. B). A timely petition for rehearing was denied on March 17, 1981 (App. C). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 49 U.S.C. §§10903-10905 and 5 U.S.C. §§557(b) and 706. These provisions are set forth in the statutory appendix to this Petition for Certiorari.

STATEMENT OF THE CASE

Petitioner Illinois Central Gulf Railroad Company ("ICG") is a railroad with main lines between Chicago and the Gulf of Mexico. In 1888, ICG purchased over 96 miles of line between Cherokee, Iowa, and Sioux Falls, South Dakota. This line is known as the ICG Sioux Falls District line. The line has been used in the past to transport light loading traffic, primarily merchandise shipped in trailers on flat cars ("piggyback traffic") and fresh meat. At Cherokee, eastbound freight is transferred to continuing eastbound trains moving ultimately to Chicago. The through trains to Chicago originate at Council Bluffs, Iowa (App. A at A-2 - A-3; App. F at F-2 - F-5).

The abandonment provisions of the Interstate Commerce Act reflect the intent of Congress to facilitate abandonments of excess and uneconomical branch lines. In the early 1970's, Congress became aware that such lines imposed a tremendous burden on the railroad industry, and that continuation of this burden, year after year, would jeopardize the ability of the railroads to maintain the efficiency of their operations and to earn sufficient revenues to attract private capital. One of the problems which had

forced the Penn Central Transportation Company and six other Northeastern railroads into bankruptcy was their maintenance of service over excess and uneconomical branch lines. Under the abandonment provisions of the Act in effect until the early 1970's, any attempt by a bankrupt railroad to abandon unprofitable branch lines led to prolonged hearings before the Commission.[1]

Because of its concern, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, Sections 304 and 402 of which created a special, temporary framework for preserving essential service in the Northeast but permitting abandonment of nonessential, uneconomical lines.

By 1976, Congress had become aware that the problem of uneconomical branch lines was not limited to the Northeast but that such lines constituted an immense economic burden upon the railroad industry throughout the country.[2] Congress also recognized that the Commission's administrative processing of abandonment applications was time-consuming and thus quite costly to the railroads.[3] Accordingly, Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Section 802 of which abolished the preexisting abandonment provisions of the Interstate Commerce Act and created a new statutory frame-

[1] *See In re Penn Central Transp. Co.*, 382 F. Supp. 831, 836-37, 841 (E.D. Pa. 1974); *In re Reading Co.*, 378 F. Supp. 474, 480 (E.D. Pa. 1974). Between 1973 and 1976, Congress provided over $680 million to the Consolidated Rail Corporation, the successor to Penn Central and to other bankrupt railroads, in grants and loans for emergency expenditures and plant rehabilitation, and guaranteed hundreds of millions more in rehabilitation and creditor claims. *Hearings on Railroad Amendments of 1976 Before House Committee on Interstate and Foreign Commerce*, 94th Cong., 2d. Sess. 158-162 (1976).

[2] As of 1975, there were approximately 22,500 miles of uneconomical branch lines throughout the United States. These lines cost the railroads over $140 million annually. S. Rep. No. 94-499, 94th Cong., 1st Sess. 39-44 (1975).

[3] *Hearings on Surface Transportation Legislation Before the Senate Subcommittee on Surface Transportation*, 92d Cong., 1st Sess. 170 (1972).

work[4] to govern Commission abandonment and discontinuance proceedings throughout the country (Pub. L. 94-210, 90 Stat. 127, 146).[5]

Pursuant to the abandonment provisions of the Interstate Commerce Act, the Commission promulgated regulations governing abandonment applications and procedures (49 C.F.R. §1121). These regulations provide, *inter alia*, that salaries and wages for train and engine crews are "avoidable costs" of operating the line where such costs are incurred solely as the result of the continuation of rail freight service on the branch (*id.* §§1121.32(d), 1121.42(c)(1)-(2), 1121.46).

On December 27, 1977, pursuant to the provisions of the Interstate Commerce Act as amended in 1973 and 1976, and pursuant to the Commission's regulations, ICG filed an application with the Interstate Commerce Commission for authority to abandon the Sioux Falls District line. In its application, ICG explained that the line had become unprofitable, that traffic on the line had been declining steadily since 1974, and that all of the fresh meat traffic on the line had recently been diverted to highway transportation (App. F at F-1, F-4 - F-5, F-9).

Following the filing of ICG's application, the case was assigned to an administrative law judge for hearing. The ALJ conducted hearings in May and October, 1978.

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[4]*See Chicago & North Western Transportation Co.* v. *United States*, 582 F.2d 1043, 1045-47 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1978).

[5]In the Staggers Rail Act of 1980, Congress again acted to facilitate abandonment proceedings—this time by imposing a time limit of 135 days upon Commission investigations of abandonment applications for the purpose of "protecting carriers from protracted legal proceedings which are calculated merely to tediously extend the abandonment process." H. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980); Pub. L. 96-448, §402, 94 Stat. 1941-42 (1980).

The Decision of the ALJ

In a decision made on January 12, 1979, the ALJ recommended that ICG's application be denied (App. F). The ALJ concluded that, although ICG had alleged that it was sustaining a loss on the Sioux Falls District line, the revenues generated by the line had been sufficient to make a contribution to ICG. The ALJ reasoned that, in calculating the "avoidable costs" of the line, ICG had erroneously included sums attributable to the wages of the trainmen and train enginemen who operate trains over the Sioux Falls District line, and all property taxes paid by ICG attributable to that line (*id.* at F-9 - F-11). The ALJ cited the testimony of a witness for the United Transportation Union to the effect that an enforceable collective bargaining agreement between ICG and the Union obligated ICG to continue paying the wages of the Sioux Falls District line's two crews indefinitely, regardless of whether the trains moved.[6] The ALJ concluded that this expense was therefore not "avoidable" upon abandonment (*id.*). The ALJ also deducted property tax expenses attributable to the Sioux Falls District line for the stated reason that ICG had received no firm offers for sale of its real property on the line (*id.* at F-11). After deducting these wages and property taxes from ICG's cost calculations, the ALJ found that during the last several years, revenues from the line had exceeded costs, despite strikes, drought, and the use of dilapidated equipment on the line (*id.* at F-11, F-29).

Although the ALJ found that traffic had steadily decreased on the Sioux Falls District line, she attributed much of the reduction to ICG's own "building up [of] a case for itself" (*id.* at F-30). Nothing in the record, she concluded, showed that much of the lost traffic could not be recaptured by ICG. The ALJ also found that, although the Sioux Falls District line earned a low rate of return on investment, this was not a sufficient reason for abandonment. ICG had made no commitment as to its future use of the

[6] As will be explained *infra*, neither the union witness nor any other opponent of ICG's application introduced the collective bargaining agreement into the record.

funds which it would realize from abandonment; these funds therefore might be used by ICG's parent company for non-railroad related uses. Such uses, she concluded, were not in the public interest and, in any event, the line had reasonable prospects for operating at a profit in the future. On the other hand, the ALJ found that it "seems more likely than not" that the loss of the line would have an adverse effect on rural and community development (*id.* at F-31 - F-32). Balancing these interests, the ALJ concluded that abandonment of the line would be inconsistent with the public convenience and necessity (*id.* at F-29 - F-33).

The Decision of Division 1 of the Commission

Following the ALJ's decision, ICG appealed to Division 1 of the Commission. That panel made its decision on August 24, 1979 (App. E). Although the panel adopted the ALJ's factual findings, it arrived at a contrary conclusion and authorized the ICG to abandon the Sioux Falls District line.

The Commission's panel disagreed with the ALJ's exclusion of labor costs and property taxes from the costs of operating the line. Labor costs, the panel held, should be included with other "avoidable costs" for three reasons. First, the abandonment regulations of the ICC provide that such wages are to be included as avoidable costs. Second, the Commission has neither the expertise nor the responsibility to interpret private collective bargaining agreements. Finally, an outside labor contract cannot affect Commission consideration of questions of public convenience and necessity (*id.* at E-4 - E-5). The panel also ruled that property taxes are avoidable costs because, even if ICG had received no firm offerings for its real estate holdings, it could be assumed that ICG would divest itself of these holdings within a reasonably short period of time following abandonment (*id.* at E-5).

Balancing the burden of operating the Sioux Falls line to ICG against any burden which abandonment of the line would impose on the public, the Commission's panel concluded that abandonment should be permitted. The panel reasoned that the ALJ's

view that ICG would regain traffic was purely speculative, because no shippers had testified that ICG could recover the fresh meat traffic or that ICG had any increased traffic volume in sight, and because the grain traffic which the ALJ expected ICG to recapture had never been great in the first place. Furthermore, since 1974 the volume of traffic on the Sioux Falls District line had steadily declined. Including the crew wages and property taxes in cost calculations, the panel concluded that ICG had not realized a profit since 1975. Although ICG had made a $24,000 profit during fiscal year 1976, it had sustained a loss of $133,000 in fiscal year 1977. The panel concluded that the economic burden on ICG of operating the line was not offset by any adverse impact of abandonment on shippers, consumers, and rural and community development (*id.* at E-5 - E-7). Consequently, ICG's application was granted (*id.* at E-7 - E-8).

The Decision of the Commission

The various parties protesting the proposed abandonment filed an appeal to the full Commission. The petition for administrative review of Division 1's decision was granted, and in a decision made on February 15, 1980, the Commission affirmed the decision of the panel (App. D). The Commission concluded that the panel had correctly included the labor costs as avoidable costs, not simply for the three reasons given by the panel, but because every ongoing out-of-pocket cost incurred in operating a particular line that cannot properly be allocated to any other revenue-producing operation of the railroad must be considered part of the cost of the operation to be abandoned. Although a cost is not "avoidable" if it is a joint cost which *other* traffic on the same line would bear upon abandonment, the Commission concluded that the costs in controversy incurred in performing service via the Sioux Falls District line were *not* joint costs. The only service performed by the crews in question was the operation of trains over the Cherokee-Sioux Falls Line (*id.* at D-3 - D-5).

Moreover, even if the collective bargaining agreement did require ICG to continue paying the wages of the crews following abandonment (and the Commission made no finding that such continued payments would be required), the Commission held that exclusion of these wages from avoidable costs would be a "distortion of reality" (*id.* at D-5). Because such costs are not joint costs, they must be treated as costs of the particular branch line at issue in the case. Costs should not be excluded from computation of avoidable costs even if the railroad would not be able to realize savings from them immediately. Although public policy encourages collective bargaining agreements which protect the rights of workers upon abandonment, the Commission concluded that such agreements should not be used to deny abandonment by creating an "imaginary profit" (*id.* at D-5 - D-7). The Commission agreed with its panel that the real property taxes paid by ICG on the Sioux Falls District line should be treated as avoidable costs (*id.* at D-7 - D-9).

The Commission concluded that the ALJ had imposed an excessive and improper burden on ICG in these proceedings. Although the railroad had the ultimate burden of persuasion and must produce the data required by its abandonment regulations, the Commission held that the railroad had no duty to prove the negative of every contention raised by protestants. Consequently, the ALJ had erred in ruling, for example, that ICG could reasonably be expected to make a profit in the future because there was no evidence that ICG could not recover much of the traffic it had lost. The Commission held that where the railroad had complied fully with the Commission's abandonment regulations, produced the data required by those regulations, and produced competent witnesses, it had met its initial burden of coming forward with the evidence. In this case, the Commission found, ICG had met these requirements (*id.* at D-9 - D-12).

The Commission refused to disturb its panel's findings regarding future traffic prospects (*id.* at D-12). Concluding its analysis, the Commission found that, on balance, the public convenience

and necessity justified abandonment. Whether the burden on ICG of operating the line was undue, the Commission stated, depends on other factors "which have been fully considered in this case" (*id.* at D-5). The Commission added, "we see no basis for disturbing Division 1's ultimate weighing of the factors of public convenience and necessity, which led it to conclude that abandonment should be permitted" (*id.* at D-12).

The Decision of the Court of Appeals

The protestants in the abandonment proceeding filed a petition for review with the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 2321 and 2342-2344. On February 12, 1981, a divided panel of the Court of Appeals issued a 2-to-1 decision reversing the ICC's decision and remanding the proceedings for further consideration by the Commission (App. A).

The majority opinion first described the history of the proceeding, characterizing the ALJ's decision as "well reasoned" and asserting that the rationale of Division 1 in reversing the ALJ "rested, basically, upon its determination that labor costs and property taxes are avoidable costs as a matter of law" (*id.* at A-4, A-8). In describing the full Commission's decision, the majority stated (incorrectly) that "the Commission redefined the term 'avoidable cost' as joint cost, *i.e.*, a cost borne in part by another revenue-raising entity" (*id.* at A-10).

The majority then turned to its analysis of what it called the two dispositive questions in the case—whether the Commission correctly included train and engine crew wages as avoidable costs, and whether the Commission properly balanced the interests of the carrier and the affected communities before it authorized abandonment. As Judge Adams noted in his dissent, only the first issue had been raised by petitioners in the Court of Appeals (*id.* at A-18, A-24).

Before commencing its analysis, the majority affirmed in a brief footnote the Commission's decision that ICG's property

taxes may be treated as avoidable costs (*id.* at A-12 n.5). Turning to the matter of the crew wages, the majority concluded that the Commission had erred in characterizing such wages as avoidable costs. Citing the definition of "avoidable costs" set forth in 49 U.S.C. §10905(a)(1),[7] and referring to the testimony of a union witness as to the effect of the collective bargaining agreement, the majority held that the characterization of these wages as "avoidable costs" was incorrect. The Court held that crew wages were not an "avoidable cost" because the Court agreed with the ALJ that ICG would continue to pay such wages after abandonment (*id.* at A-16).

The majority also found that the Commission had not properly balanced the interests of the carrier and the affected communities in authorizing abandonment. The ALJ, the majority asserted, had "correctly reasoned" that abandonment should not be authorized merely because the capital realized from sale of the abandoned properties could be invested in a more profitable activity. Congress intended this factor to be measured in light of the burden that abandonment would impose on affected communities and shippers. By contrast, "The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible" (*id.*).

Thus, with regard to the balancing analysis, the majority concluded that, "The ALJ was right and the Commission was

[7] 49 U.S.C. §10905(a)(1) provides in pertinent part:

> " 'avoidable cost' means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation."

wrong" (*id.*). Accordingly, the majority remanded the case to the Commission (*id.* at A-17):

> "Although we think the ALJ correctly complied with the statute and properly balanced the competing interests of all affected parties, we cannot be called upon to affirm her decision on the basis of our independent review of the record. We have no alternative here but to remand this case to the Commission with directions to properly balance the benefits and burdens that would inure to *both* the carrier and the communities upon either abandonment or forced continued operation of the line. We further direct the Commission to articulate, with precision, its conclusions in this regard and issue an order that is capable of proper review by this Court."

Judge Adams vigorously dissented from the majority opinion (*id.*). The scope of review of an order of the Interstate Commerce Commission, he argued, is limited to a determination of whether the Commission's findings and conclusions are supported by substantial evidence on the record as a whole and whether the order is supported by a rational judgment of the Commission. The majority had transgressed the proper scope of review (*id.* at A-19):

> "It is not, however, within our province to choose between discrepant decisions by the ALJ and the Commission, nor, as the majority seems to suggest, to alter our level of review because the decisions are contradictory."

Judge Adams also disagreed with the majority's finding that labor costs should not have been included as avoidable costs. Contrary to the majority's assertion, the Commission had *not* stated that avoidable costs are synonymous with joint costs; indeed, the Commission had stated that avoidable costs are defined *in contrast to* joint costs (*id.* at A-20). Furthermore, the Commission's definition of avoidable costs had properly reflected the statutory definition. The Commission had rationally reasoned that the labor agreement could be renegotiated or that attrition would eventually take place,[8] and that it would be improper to use labor protective provisions as a basis for ignoring present labor costs.

[8] *See* App. D at D-6 n.5.

The Commission's regulations defined such costs to be avoidable, and the effect of the collective bargaining agreement was in question. Moreover, Judge Adams stated, the majority's exclusion of avoidable costs was inconsistent with its finding that property taxes had been properly included as avoidable costs (*id.* at A-20 - A-24). Finally, Judge Adams objected to the court's review of the balancing analysis of the Commission, for that issue had not been raised by the parties. In any event, he concluded, the Commission had balanced adequately the benefits and burdens of abandonment to the railroad and the communities (*id.* at A-24 - A-27).

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals In Reviewing and Setting Aside the Commission's Determination That Crew Wages Paid By ICG Constituted "Avoidable Costs" Is Contrary to the Administrative Procedure Act, the Decisions of This Court in *Universal Camera Corp.* v. *NLRB* and *FCC* v. *Allentown Broadcasting Corp.*, and Other Decisions of the Courts of Appeals

Agreeing with the analysis of the ALJ, the majority opinion of the Court of Appeals concluded that the labor costs at issue were not "avoidable costs" within the definition set forth in 49 U.S.C. §10905 (a)(1) because a labor agreement allegedly obligated the railroad to continue paying crew wages even after abandonment. The majority opinion's approach is contrary to the Administrative Procedure Act and to the holdings of this Court and other courts of appeals. It also ignores the Commission's regulations and the record itself.

Under the Interstate Commerce Act, a rail carrier seeking to abandon a rail line must file an application for a certificate of abandonment and a notice of intent to abandon (49 U.S.C. §10904(a)(1)). If the Commission finds that "the present or fu-

ture public convenience and necessity require or permit the abandonment," it may issue the certificate (*id.* §10903(a)).[9]

One of the factors which the Commission considers in determining "public convenience and necessity" is the profitability of the line. This factor is "relevant and may often be controlling," but a finding of unprofitability is not required before a certificate may be issued. *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926).

In determining the profitability of a line, the Commission has used the concept of "avoidable costs" to ascertain whether the line which a carrier seeks to abandon is in fact profitable. The Commission's use of this concept is purely a matter of its own choosing; contrary to the impression conveyed by the majority of the Court of Appeals, the sole statutory criteria guiding the Commission in abandonment cases is the "public convenience and necessity" standard.[10]

[9]The Act does not define the term "public convenience and necessity," nor does it specify any criteria which the ICC must or may use in deciding what is required or permitted by the "public convenience and necessity." Rather, the Act authorizes the ICC to use its discretion and expertise to determine in each instance whether abandonment should be permitted. *See, e.g., ICC* v. *Parker*, 326 U.S. 60, 65 (1944); *Farmland Industries, Inc.* v. *United States*, 642 F.2d 208, 210-11 (7th Cir. 1981).

[10]The concept of "avoidable cost" appears only in Section 10905 of the Interstate Commerce Act, which requires the Commission to postpone the issuance of a certificate of abandonment if a "financially responsible person" offers a subsidy equal to the difference between the revenues attributable to the line and the "avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line" (49 U.S.C. §10905(d)(2)). For the purposes of *that* provision, "avoidable cost" is defined as follows, in pertinent part (*id.* §10905(a)(1)):

> "(1) 'avoidable cost' means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which transportation was provided were abandoned or the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation."

As stated *supra*, (p. 4), the Commission's regulations define salaries and wages for train and engine crews as "avoidable costs" of operating the line where such costs are incurred solely as the result of the continuation of rail freight service on the branch. In considering the merits of ICG's application, the Commission interpreted its regulations to include within the concept of "avoidable costs" the train and crew wages paid by ICG to railroad employees who work only on the Sioux Falls District line—thus overruling the interpretation of the ALJ.

The standards of review to be applied by a reviewing court in a case involving a decision of the Commission to issue a certificate of abandonment are well-established. A reviewing court is not to substitute its judgment for that of the Commission. The Commission's decision is to be affirmed if it is based on adequate findings supported by the record.[11] Cost allocations and cost computations of the Commission may be set aside only if they are arbitrary or capricious.[12] The Commission's interpretation of the statute which it is charged with enforcing is to be given considerable deference. The Commission's interpretation of its own regulations is to be accorded even greater deference.[13]

[11] *See, e.g., People of the State of Illinois* v. *United States*, 604 F.2d 519, 527 (7th Cir. 1979), *cert. denied*, 445 U.S. 951 (1980); *State of Maine Transportation Dept.* v. *ICC*, 587 F.2d 541 (1st Cir. 1978); *Iowa City-Montezuma Railroad Shippers Assn.* v. *United States*, 357 F. Supp. 321, 322-23 (S.D. Ia. 1972); *Prinsburg Coop Fertilizer Co.* v. *United States*, 338 F. Supp. 1059, 1061 (D. Minn. 1971), *aff'd on appeal*, 405 U.S. 906 (1972); *City of New York* v. *United States*, 337 F. Supp. 150 (E.D.N.Y. 1972); *Asbury* v. *United States*, 298 F. Supp. 589 (W.D. Va. 1969); *Northwestern Pacific R.R.* v. *United States*, 228 F. Supp. 690, 694-96 (N.D. Cal.), *aff'd per curiam*, 379 U.S. 132 (1964). *See also People of the State of Illinois* v. *United States*, ____ F.2d ____ (Nos. 78-1762 *et al.*) (7th Cir., Jan. 20, 1981) (decisions of ICC in abandonment cases are to be reviewed solely in terms of the "arbitrary and capricious" standard, not the "substantial evidence" standard).

[12] *See, e.g., Washington and Old Dominion Users Assn.* v. *United States*, 287 F. Supp. 528 (E.D. Va. 1968); *Moeller* v. *ICC*, 201 F. Supp. 583, 588 (S.D. Ia. 1962).

[13] *Andrus* v. *Idaho*, 445 U.S. 715, 729 (1980); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

The majority opinion of the Court of Appeals totally failed to adhere to these standards in reviewing and setting aside the Commission's decision to classify the wages paid to train and engine crews on the Sioux Falls District line as "avoidable costs."

The majority's first and most egregious error consisted of its comparison of the analyses of the ALJ and the Commission to determine which was the more "correct" or "preferable" treatment of the avoidable cost issue. The majority took the position that it must apply a more rigorous standard of review in this case in part because the Commission had not accepted the recommendation of the ALJ (*id.* at App. A, at A-11 n.4). The task of a reviewing court, however, is to analyze the decision of *the agency* to determine whether it is supported by reasoned analysis and whether the findings therein are supported by the record. That standard is not altered when the agency's decision differs from that of an ALJ. The ICC, like other regulatory agencies, is subject to the provisions of the Administrative Procedure Act. Section 8(a) of the APA, 5 U.S.C. §557(b), provides that "on appeal from or review of the initial decision [of an ALJ], the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." Furthermore, the statute conferring jurisdiction on a court of appeals to review Commission decisions provides that it is the final decision of the Commission, not that of the ALJ, that is to be reviewed (28 U.S.C. §§2321, 2342).

In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), this Court described the proper standard of judicial review of an agency decision which rejects the recommendation of an administrative law judge. The Court held that a reviewing court is to confine its task to determining whether the decision and order of *the agency* are supported by the record. A reviewing court is to take the findings and opinion of the ALJ into account, but it is *not* to compare the opinions of the agency and the ALJ in order to determine which seems to it to be preferable (*id.* at 496-97). Thus,

the Court rejected the notion that an agency has the power to reverse an ALJ's findings only when they are clearly erroneous (*id.* at 492).

The holding of *Universal Camera* was reaffirmed by this Court in *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). There, the FCC had issued a decision disagreeing with the recommendation of its examiner. The court of appeals agreed with the examiner and overruled the Commission because, *inter alia*, the findings and recommendations of the examiner were based to a great extent on the credibility of the witnesses. This Court reversed the court of appeals. "We think this attitude goes too far," the Court held, because "It seems to adopt for examiners of administrative agencies the 'clearly erroneous' rule of the Fed Rules Civ Proc, 52(a), applicable to courts" (*id.* at 364). This standard was inconsistent with the holding of *Universal Camera*. This Court noted that the Communications Act provided that the FCC, not the hearing examiner, had the power and duty to make the final, judicially reviewable decision (*id.* at 364-65).

The principles of *Universal Camera* and *Allentown* are equally applicable to decisions of the Interstate Commerce Commission.

This Court has not explored in depth the issues raised in *Universal Camera* and *Allentown* for over 25 years. However, in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 298 (1974), this Court stated that the ICC is "not compelled to adopt the same approach as the examiners" in determining what is required by the "public convenience and necessity." Furthermore, the lower courts and commentators have adhered to the principles of *Universal Camera* and *Allentown* that although a reviewing court must take into account (as part of the record) the findings and recommendations of an ALJ, the proper function of a reviewing court is to determine whether the *agency's* decision is supported by findings and evidence—not (a) whether the ALJ's findings are supported by evidence, (b) whether the ALJ's findings are clearly erroneous, (c) whether the

agency's findings or the ALJ's findings are better supported, or (d) what findings the court would make."

The avoidable cost analysis of the majority in *City of Cherokee* is contrary to the scope of judicial review set forth in *Universal Camera* and *Allentown*. Indeed, the majority did exactly what this Court held to be improper in those two cases—it compared the analyses and findings of the ALJ and the Commission, and decided that one is better than the other.[15]

The majority's second error was its failure to allow the Commission any deference in determining what costs should be included in the determination of the profitability of the line. In *Farmland Industries, Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981), the United States Court of Appeals for the Seventh Circuit upheld the Commission's policy of including opportunity costs in its computations. *Accord, Missouri Pacific R.R.* v. *United States*, 625 F.2d 178 (8th Cir. 1980). These cases recognize that the Commission is entitled to consider economic realities and is not required to give a rigid construction to the Interstate Com-

[14] *See, e.g., Eastern Engineering & Elevator Co., Inc.* v. *NLRB*, 637 F.2d 191, 197 (3d Cir. 1980); *Medical Center of Independence* v. *Harris*, 628 F.2d 1113, 1117 (8th Cir. 1980); *Bangor & Aroostook R.R.* v. *Maine Central R.R.*, 574 F.2d 1096, 1110 (1st Cir.), *cert. denied*, 439 U.S. 837 (1978); *NLRB* v. *Midvalley Steel Fabricators, Inc.*, 621 F.2d 49, 53 n.2 (2d Cir. 1980); *Williams* v. *Bell*, 587 F.2d 1240, 1246-47 & nn.51-54 (D.C. Cir. 1978); *Glenroy Construction Co.* v. *NLRB*, 527 F.2d 465, 467-68 (7th Cir. 1975); *Adolph Coors Co.* v. FTC, 497 F.2d 1178, 1184 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *NLRB* v. *Miller Redwood Co.*, 407 F.2d 1366, 1369 (9th Cir. 1969); *NLRB* v. *Winn-Dixie Greenville, Inc.*, 379 F.2d 958, 960 (4th Cir. 1967); *Hamlin Testing Laboratories, Inc.* v. *United States Atomic Energy Commission*, 357 F.2d 632, 637-38 (6th Cir. 1966); *NLRB* v. *Tex-O-Kan Flour Mills Co.*, 122 F.2d 433, 437 (5th Cir. 1941); K. DAVIS, ADMINISTRATIVE LAW TREATISE §17.16, at 327-336 (1980).

[15] Although the majority opinion failed to adhere to the principles of *Universal Camera* and *Allentown*, it acknowledged the validity of those principles by conceding that it lacked the power to affirm the decision of the ALJ (App. A at A-17).

merce Act in its balancing analysis. They also recognize that costs should not be excluded from consideration in the Commission's balancing analysis even if such costs are not immediately avoidable upon abandonment.[16]

The majority opinion in *City of Cherokee* is totally contrary to the above-referenced cases. *Farmland Industries* and *Missouri Pacific* recognize that in determining the profitability of a line, *all* costs incurred in the operation of the line must be considered. By contrast, *City of Cherokee* holds that where the revenues attributable to a line exceed avoidable costs (as that term is restrictively interpreted by the majority) and the railroad thus shows a "paper profit" on the line, an application for abandonment must be denied. Moreover, the majority's holding that costs not immediately "avoided" upon elimination of an activity are not "avoidable" would dictate the exclusion of any such costs which would not be immediately eliminated upon abandonment—a result inconsistent with the holdings of *Farmland Industries* and *Missouri Pacific.*

The third error of the majority opinion lies in its failure to accord the Commission the considerable deference due to an agency's interpretation of its own regulations. These regulations provide that labor costs *are* includable in the "avoidable costs" of maintaining a particular branch line (*supra,* p. 4). The Commission interpreted its regulations with respect to "avoidable costs" to include the payment of wages to train and engine crews, even assuming *arguendo* that a contract obligated the carrier to continue assigning the crews to the line after abandonment. The reasons

[16]*See also Chicago & North Western Transportation Co.* v. *United States*, 582 F.2d 1043 (7th Cir.), *cert. denied*, 439 U.S. 1039 (1978) (holding that the Commission should broadly interpret the term "current costs" in the statutory definition of "avoidable cost" to mean the cost of purchasing new equipment, rather than the original cost of the carrier's existing equipment, in computing depreciable cost of existing equipment); *Commonwealth of Pennsylvania* v. *ICC*, 535 F.2d 91 (D.C. Cir. 1976) (affirming broad Commission definition of "avoidable costs" promulgated pursuant to Section 205(d) of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §715(d)).

given by the Commission were: (1) its regulations expressly classify such labor costs as avoidable costs; (2) the effect of these regulations cannot be overcome by a private collective bargaining agreement;[17] (3) the interpretation of such an agreement is not within the scope of the Commission's expertise and responsibility;[18] and (4) because the purpose of the regulations is to allow an objective calculation of the effect of an abandonment on the economic well-being of the railroad, every out-of-pocket cost incurred in operating a particular line that cannot properly be reallocated to any other revenue-producing operation must realistically be considered part of the avoidable costs of the operation to be abandoned. These reasons constituted a reasoned basis for the Commission's interpretation of its definition of "avoidable cost." The majority of the Court of Appeals plainly erred in "picking and choosing" between the analyses of the ALJ and the Commission and determining which interpretation was correct, instead of determining whether the Commission's interpretation was arbitrary or capricious.

Furthermore, the majority opinion erred in making a ruling that is totally unsupported by the record. In ruling that the wages in question were not avoidable costs, the Court of Appeals relied

[17]Courts have long held that the Commission's power to authorize abandonments overrides private contracts which would otherwise prevent a railroad from abandoning its line. *See, e.g., Colorado* v. *United States*, 226 U.S. 153, 166-67 (1926); *Gulf, Mobile, & Ohio R.R.* v. *Illinois Central R.R.*, 225 F.2d 816, 821 (5th Cir. 1955), *cert. denied*, 350 U.S. 932 (1956); *State of North Carolina* v. *United States*, 210 F. Supp. 675, 679 (M.D.N.C. 1962), *rev'd on other grounds*, 376 U.S. 93 (1964); *Burke County, Georgia* v. *United States*, 206 F. Supp. 586, 588 (S.D. Ga. 1962); *Moeller* v. *ICC*, 201 F. Supp. 583, 589-90 (S.D. Ia. 1962); *Village of Mantorville* v. *Chicago Great Western R. Co.*, 8 F. Supp. 791, 795 (D. Minn. 1934).

[18]This reason was correct as a matter of law. *See, e.g., Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 391 (1932) (Commission lacks power to interpret corporate charter of railroad applicant to determine whether it has power to operate an extended line); *Gulf, M. & N.R.R. Co.* v. *Illinois Cent. R.R.*, 21 F. Supp. 282, 290-91 (W.D. Tenn. 1937), *appeal dismissed*, 109 F.2d 1016 (6th Cir. 1940) (ICC lacks jurisdiction to interpret collective bargaining agreements).

on the statement of a union witness who (according to the majority opinion) had testified, "without equivocation," that a labor-management agreement obligated the carrier to assign these crews to the line even after abandonment, the only indication to the contrary being the denial of ICG's attorney (App. A at A-14 n.7). The majority was clearly in error, for three reasons. First, it was *undisputed* that the crew wages at issue were solely attributable to the operation of the Sioux Falls District line. Second, the contract in question was not submitted by the protestants at the hearing before the ALJ. Third, and most important, in relying on the witness's conclusory answer extracted in response to a leading question of the ALJ, the majority ignored the fact that the union witness elsewhere conceded that the contract did *not* contain a provision obligating the carrier to continue assigning the crews to the line following abandonment.[19] It has long been held that when an employer closes a portion of his business, his obligations under a collective bargaining agreement as to that portion expire

[19]The witness, M.S. Stuckey, testified as follows (Transcript 470-472):

"Q: Mr. Stuckey, would you agree with me that this tabulated local agreement we've been talking about simply says that the company shall assign crews over the following districts, so many crews in this district and so many crews in that district, is that what it says?

"A: That's true.

"Q. *The agreement is completely silent as to what happens if one of those districts doesn't exist, isn't that right?*

"A. *Of course, you don't negotiate and make agreements of crews that don't exist or of assignments that don't exist or on railroads that don't exist. The agreement was made looking toward the maintenance and operation of the railroad.*" (Emphasis added.)

* * *

"Judge Cappello: Let me see if I understand this. Is it your position that under this agreement the railroad is going to have to assign two crews between Cherokee and Sioux Falls even though the line is abandoned and even though the employees have been placed elsewhere on the line?

"The Witness: Your Honor, those were the preexisting conditions at the beginning of the turn of the century, and the company any time—and that's the company's obligation, to—

"Judge Cappello (interrupting): Is your answer yes to my question?

"The Witness: The answer is yes."

absent a clear provision to the contrary in the collective bargaining agreement.[20]

Finally, the majority's analysis of the entire avoidable cost issue is internally inconsistent. As stated *supra*, the Court of Appeals found that the Commission had correctly classified *property taxes* as avoidable costs (App. A at A-12 n.5). The payment of property taxes would not be eliminated merely by virtue of cessation of service on the line. Yet the majority held that crew wages were not avoidable costs because a collective bargaining agreement prevented them from being avoided immediately upon cessation of service. The reasoning which prompted the majority's affirmance of the Commission's treatment of property taxes as avoidable costs—that the property would be sold eventually, even if some time may pass between abandonment and sale—is equally applicable to the payment of wages.

This internal inconsistency, and the inconsistency of the majority's analysis with *Universal Camera*, *Allentown*, and the aforementioned decisions of other courts, justify the grant of certiorari to review the judgment below.

Review by this Court of the decision below is particularly important in light of the serious adverse impact which this decision would have on the nation's railroads and on rail service to the public. Studies show that in 1976 railroads lost more than $150 million annually (not considering opportunity costs) in operating uneconomical light-density lines outside the Northeast.

[20] *See, e.g., Wimberly* v. *Clark Controller Co.*, 364 F.2d 225 (6th Cir. 1966); *Fraser* v. *Magic Chef-Food Giant Markets, Inc.*, 324 F.2d 853 (6th Cir. 1963); *United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO* v. *Great American Industries, Inc.*, 479 F. Supp. 216, 234 (S.D.N.Y. 1979); *Christopher* v. *Safeway Stores*, 476 F. Supp. 950, 952-53 (E.D. Tex. 1979); *Union de Trobajadores* v. *Helio San Jeronimo Corp.*, 434 F.Supp. 643, 646-47 (D. Puerto Rico 1977); *International Union* v. *Northern Telecom, Inc.*, 434 F.Supp. 331, 335 (E.D. Mich. 1977); *American Bakery & Confectionery Workers International Union, Local Union No. 12, AFL-CIO* v. *Liberty Baking, Inc.*, 242 F. Supp. 238, 245 (W.D. Pa. 1965).

Railroads which have received permission to abandon lines have realized substantial savings.[21] Yet, if the decision of the majority of the panel of the Court of Appeals is allowed to stand, abandonments will be far more difficult for railroads to obtain—despite the clear intent of Congress to the contrary when it enacted new abandonment provisions in 1973 and 1976 and, most recently, in the Staggers Rail Act of 1980 (*supra*, pp. 3–4). If railroads are forced to maintain uneconomical branch lines, service to the public on existing lines will deteriorate and shippers will turn to other modes of transportation—thus frustrating the national goal of energy self-sufficiency. The decision below jeopardizes not only other Commission decisions in abandonment cases pending in the courts of appeals on review,[22] but also other abandonment applica-

[21] *Railroad Deregulation Act of 1979: Hearings on H.R. 4570 Before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 1034-35 (1979); 3 *Railroad Deregulation Act of 1979: Hearings Before the Subcommittee on Surface Transportation of the Committee on Commerce, Science and Transportation on S.796*, 96th Cong., 1st Sess. 937 (1979).

[22] The Commission's treatment of labor costs as avoidable costs of an abandonment is the subject of two other cases now pending in the courts of appeals. In No. AB-43 (Sub-No. 55F), *Illinois Central Gulf Railroad Company Abandonment Between (1) Vance and Tutwiler, MS. in Tallahatchie and Quitman Counties, MS. and (2) Tutwiler and Belzoni, MS. in Tallahatchie, Sunflower, Coahoma and Humphreys Counties, MS.* (decisions served June 6, 1980 and August 15, 1980), the Commission—relying on the decision which it made in the instant case—held that wages paid to enginemen and firemen were avoidable costs, even though these employees were permitted to operate on other trains in the area pursuant to various agreements. That ruling, and the Commission's decision to issue a certificate of abandonment, have been appealed by protestants to the United States Court of Appeals for the Fifth Circuit. *Mississippi Public Service Commission, et al.* v. *ICC*, No. 80-3723 (5th Cir.). In No. AB-10 (Sub-No. 11), *Norfolk and Western Railway Company Abandonment Between New Castle and Rushville, In Henry and Rush Counties, Indiana* (decision served May 30, 1979), an ALJ ruled that an applicant's labor costs were not avoidable because the employees devoted only a portion of their time to work on the line in question. Denying the application, the ALJ held that the employees' wages were avoid-

(Footnote continued on following page)

tions presently pending before the Commission.[23] To prevent these seriously adverse consequences, this Court should grant the petition for certiorari, and review and reverse the decision of the Court of Appeals.

II. The Decision of the Court of Appeals In Reviewing and Setting Aside the Commission's Balancing of Interests Is Contrary to the Standard of Review Set Forth By This Court's Decisions in *Universal Camera*, *Allentown*, and *Colorado* v. *United States*

In this case, both Division 1 and the Commission found that abandonment of the Sioux Falls District line was consistent with the public convenience and necessity. The Commission adopted by incorporation the balancing analysis of Division 1, because the only issues raised on appeal from that panel were the inclusion of certain expenses as "avoidable costs" and the burden of proof in

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(Footnote continued from previous page)
able only if they were no longer required or if they were assigned to duties on other portions of the system in lieu of other employees, for which there was no evidence in the record. The Commission, however, reversed the ALJ and authorized abandonment (363 I.C.C. 115). Protestants have appealed the Commission's decision to the United States Court of Appeals for the Seventh Circuit. *International Minerals & Chemical Corp.* v. *ICC*, No. 80-2096 (and consolidated case No. 80-2097) (7th Cir.).

[23]The majority opinion has already affected the Commission's cost calculations in at least one abandonment case. In Docket No. AB-18 (Sub-No. 35F), *Chesapeake and Ohio Railway Company—Abandonment—Near South Haven and Hartford in Van Buren County, Michigan* (decision served May 14, 1981, at 5, 7), an ALJ cited the majority opinion in *City of Cherokee* in holding that certain crew wages were not "avoidable costs" because C&O, rather than lay off the crews, planned to assign them to other parts of its system. By so extending the majority opinion, the decision of the ALJ makes it extremely unlikely that crew wages will ever be classified as "avoidable costs." If the railroad must continue to assign the crews to the line, the majority opinion in *City of Cherokee* holds that their wages are not avoidable costs; yet, if the railroad reassigns the crews to other positions in its system, their wages are not avoidable costs because they have not been dismissed.

an abandonment proceeding. Both the panel and the Commission concluded that the inconvenience and burden on shippers and communities caused by the abandonment was outweighed by the burden to ICG and to interstate commerce by the continued operation of the line. As the Commission and Division 1 noted, traffic had been declining on the line for several years and the line was no longer profitable.

The majority decision of the Court of Appeals makes clear that the majority reviewed the decision of the Commission by comparing the analyses of the Commission and the ALJ whose recommendation it rejected, and deciding which was preferable. For example, the majority concluded its opinion by stating that "we think the ALJ properly complied with the statute and properly balanced the competing interests of all affected parties . . ." (App. A at A-17). The majority then stated that it "ha[d] no alternative" but to remand the case to the Commission with directions to "properly balance" the benefits and burdens of abandonment on the carrier and the communities (*id.*). The majority thus left no doubt that, on remand, the Commission must adopt as its analysis that of the ALJ's.

For the reasons stated in Part I, *supra*, the standard of review utilized by the majority in *City of Cherokee* was fundamentally inconsistent with the standards set forth in *Universal Camera Corp.* v. *NLRB* and *FCC* v. *Allentown Broadcasting Corp.* As Judge Adams noted in his dissent, the function of a court reviewing an administrative agency decision which has reversed a recommendation of an ALJ is not to compare the decisions of the ALJ and the agency to determine which is preferable to the court, nor is the scope of review affected by a disagreement between the agency and the ALJ (App. A at A-19).

The majority's approach was also contrary to the standard of review which this Court has described as the proper one for an appellate court reviewing the Commission's balancing of interests in an abandonment case to determine what the "public convenience and necessity" requires or permits. The balancing analysis used

by the Commission in ICG's case was not new. Since the adoption of the first abandonment provisions of the Interstate Commerce Act in the Transportation Act of 1920, the ICC has determined the public convenience and necessity in abandonment application cases by weighing the benefits of abandonment to the railroad and to interstate commerce against the inconvenience and loss which abandonment will cause to users of the line. This Court held in *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926), that such balancing is the exclusive responsibility of the *Commission.* Although Congress enacted new abandonment statutes in 1973 and 1976, it continued to entrust to the *Commission* the task of determining the "public convenience and necessity" through the balancing process in abandonment cases.[24]

The principles set forth in *Colorado* v. *United States* were reaffirmed most recently by this Court in *Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, ____ U.S. ____, 101 S.Ct. 1124 (1981).[25] This Court noted that it had previously concluded that the Commission's authority to regulate abandonments was exclusive, plenary, and broad (101 S.Ct. at 1130-31). The Court stated (*id.* at 1132):

> "The exclusive and plenary nature of the Commission's authority to rule on carriers' decisions to abandon lines is critical to the congressional scheme, which contemplates comprehensive administrative regulation of interstate commerce. In deciding whether to permit an abandonment, *the Commission must balance* 'the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other.' *Purcell* v.

[24] *See* 49 U.S.C. §10903(a); S. Rep. No. 94-499, 94th Cong., 1st Sess. 106 (1975).

[25] In *Kalo Brick & Tile*, this Court held that the Interstate Commerce Act precludes a shipper from pressing a state court action for damages against a regulated carrier when the Interstate Commerce Commission has approved the carrier's application for abandonment of the line and has reached the merits of the matters which the shipper seeks to raise in state court.

> *United States*, 315 U.S. 381, 384 (1942). *Once the Commission has struck that balance, its conclusion is entitled to considerable deference.* 'The weight to be given to cost of a relocated line as against the adverse effect upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And under the statute, *it is not a matter for judicial redecision.*' *Id.* at 385" (Emphasis added).

The majority opinion in *City of Cherokee* is not only inconsistent with the principles set forth in *Colorado* v. *United States* and *Chicago & North Western* v. *Kalo Brick & Tile Co.;* it also distorts the analysis of the Commission. Contrary to the majority opinion, the Commission's decision was not "that if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), the abandonment would be permissible" (App. A at A-16). *See* App. D at D-4 - D-5, D-9 - D-12. The majority failed to recognize (or to acknowledge) that the Commission and Division 1 (whose analysis the Commission incorporated by reference) *did* balance the needs of shippers and communities served by the line against the burden to ICG and to interstate commerce of operating the line. *See* App. D at D-5, D-12; App. E at E-5 - E-8. Division 1, for example, examined the needs of shippers and the possibility of recapture of traffic by ICG in the future, correctly finding that no shippers of fresh meat had testified that they desired ICG service, and that grain movements over the Sioux Falls line had never been substantial. Division 1 found that while the abandonment of the Sioux Falls District line (like any abandonment) would have some adverse impact on shippers and community development, this hardship was outweighed by the burden to ICG (and, therefore, to interstate commerce) of continued operation of the line. Division 1 cited the declining financial state of the line and the constant decrease of traffic since 1974 (App. E at E-5 - E-7). The Commission's decision *incorporated that analysis* by reference (App. D at D-5, D-12).

This Court should review the decision below not only because of the violation of the principles set forth in *Colorado* and *Kalo*

Brick & Tile, but also because the decision below has mandated a balancing analysis that would make railroad abandonments virtually impossible in future cases, and would thus frustrate the public interest as enunciated by Congress. By embracing the balancing analysis of the ALJ, the majority in effect construes the law as requiring that an application for abandonment should be denied whenever the railroad earns revenues exceeding avoidable costs (though not total costs) of operating the line, even if the rate of return on net investment is inadequate, unless the railroad proves that it cannot recapture lost traffic on the line, and that the funds which would be saved from the abandonment will not be used for non-rail purposes. Yet the fact that the revenues realized from operation of a particular line exceed the avoidable costs of that line (even assuming that such costs have been properly computed) does not mean that the line is making a profit. A railroad which recovered only revenues sufficient to cover its avoidable costs would soon become bankrupt. In addition, few, if any, railroads could satisfy a requirement that they show that they cannot recapture lost traffic. The balancing approach approved by the majority would therefore frustrate the Congressional policy of facilitating abandonments of unprofitable lines, and thus result in the further deterioration of rail service to the detriment of the public.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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June 15, 1981

STATUTORY APPENDIX

Prior to the enactment of the Staggers Rail Act of 1980, Sections 10903 through 10905 of the Interstate Commerce Act (Title 49, United States Code) provided as follows:

§10903. Authorizing abandonment and discontinuance of railroad lines and rail transportation

"(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

"(b)(1) A proceeding to grant authority under subsection (a) of this section begins on application filed with the Commission. Subject to sections 10904-10906 of this title, if the Commission—

(A) finds public convenience and necessity, it shall—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions that the Commission finds are required by public convenience and necessity; or

(B) fails to find public convenience and necessity, it shall deny the application.

"(2) On approval, the Commission shall issue to the rail carrier a certificate describing the abandonment or discontinuance approved by the Commission. Each certificate shall also contain provisions to protect the interests of employees. The provisions shall be at least as beneficial to those interests as the provisions established under section 11347 of this title and section 565(b) of title 45.

"(c) Except as provided in sections 10905 and 10906 of this title—

"(1) if a certificate is issued without an investigation under section 10904(c) of this title, the abandonment or discontinuance may take effect under the certificate on the 30th day after the issuance of the certificate; or

"(2) if a certificate is issued after an investigation under section 10904(c) of this title, the abandonment or discontinuance may take effect under the certificate on the 120th day after the issuance of the certificate."

§10904. Filing and procedure for applications to abandon or discontinue

"(a)(1) An application for a certificate of abandonment or discontinuance under section 10903 of this title, and a notice of intent to abandon or discontinue, must be filed with the Interstate Commerce Commission at least 60 days before the day on which the abandonment or discontinuance is to become effective.

"(2) When a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title files an application and notice of intent, the notice shall include—

(A) an accurate and understandable summary of the rail carrier's application and the reasons for the proposed abandonment or discontinuance; and

(B) a statement indicating that each interested person is entitled to recommend to the Commission that it approve, deny, or take other action concerning the application.

"(3) The rail carrier shall—

(A) send by certified mail a copy of the notice of intent to the chief executive officer of each State that would be directly affected by the proposed abandonment or discontinuance;

(B) post a copy of the notice in each terminal and station on each portion of a railroad line proposed to be abandoned or over which all transportation is to be discontinued;

(C) publish a copy of the notice for 3 consecutive weeks in a newspaper of general circulation in each county in which each such portion is located;

(D) mail a copy of the notice, to the extent practicable, to all shippers that have made significant use (as designated by the Commission) of the railroad line during the 12 months preceding the filing of the application; and

(E) attach to the notice filed with the Commission an affidavit certifying the manner in which clauses (A)-(D) of this paragraph have been satisfied.

"(b) The burden is on the person applying for the certificate to prove that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

"(c)(1) During the period between the date the application is filed through the day immediately before the date proposed in the application that the abandonment or discontinuance become effective, the Commission shall, on petition, and may, on its own initiative, begin an investigation to assist it in determining what disposition to make of the application. The order to conduct the investigation must be served on any affected rail carrier not later than the 5th day before the proposed effective date of the abandonment or discontinuance. An investigation may include public hearings at any location reasonably adjacent to the railroad line

involved in the abandonment or discontinuance. The hearing may be held on the request of an interested party or on the initiative of the Commission.

"(2) If an investigation is not conducted, the Commission shall act under section 10903(b) of this title by the last day of the period referred to in paragraph (1) of this subsection. If an investigation is to be conducted, the Commission shall postpone the proposed effective date of any part of the abandonment or discontinuance. The postponement shall be for a reasonable period of time necessary to complete the investigation.

"(d)(1) In this subsection, 'potentially subject to abandonment' has the meaning given the term in regulations of the Commission. The regulations may include standards that vary by region of the United States and by railroad or group of railroads.

"(2) Each rail carrier shall maintain a complete diagram of the transportation system operated, directly or indirectly, by the carrier. The carrier shall submit to the Commission and publish amendments to its diagram that are necessary to maintain the accuracy of the diagram. The diagram shall—

(A) include a detailed description of each of its railroad lines potentially subject to abandonment; and

(B) identify each railroad line for which the carrier plans to file an application for a certificate under subsection (a) of this section.

"(3) If an application for a certificate is opposed by—

(A) a shipper or other person that has made significant use (as determined by the Commission) of the railroad line involved in the proposed abandonment or discontinuance during the 12-month period before the filing of the application for a certificate; or

(B) a State or political subdivision of a State in which any part of the railroad line is located;

the Commission may issue a certificate under section 10903 of this title only if the railroad line has been described and identified in the diagram or amendment to the diagram of the rail carrier that was submitted to the Commission at least 4 months before the date on which the application was filed."

§10905. Offers of financial assistance to avoid abandonment and discontinuance

"(a) In this section—

"(1) 'avoidable cost' means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

"(2) 'reasonable return' means—

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

"(b) When the Commission finds under section 10903 of this title that the present or future public convenience and necessity require or permit abandonment or discontinuance, it shall publish the finding in the Federal Register. If, within 30 days after the publication, the Commission finds that—

(1) a financially responsible person (including a governmental authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to—

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance for a reasonable time, not to exceed 6 months, to enable the person or governmental authority to enter into an agreement with the rail carrier to provide the assistance or to buy that part of the railroad line and to continue to provide rail transportation over the line. Thereafter, the Commission shall determine the extent to which the avoidable cost of providing rail transportation plus a reasonable return on the rail properties involved exceed the revenues attributable to the railroad line or the rail transportation proposed to be abandoned or discontinued. On notice to the Commission that such an agreement has been executed, the Commission shall further postpone the issuance of the certificate as long as the agreement, or an extension or modification of the agreement, is in effect.

"(c) The rail carrier shall provide promptly to a party considering offering financial assistance under subsection (b) of this section—

"(1) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance; and

"(2) traffic, revenue, and other data necessary to determine the amount of financial assistance that would be required to continue rail transportation over that part of the railroad line."

Sections 557(a) and (b) and 706 of Title 5, United States Code, provide as follows:

§557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

"(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

"(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except

that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires."

§706. Scope of review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1185

City of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, K-F Motors, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, L.C. Burkhalter and M.S. Stuckey,

Petitioners,

v.

Interstate Commerce Commission and United States of America,

Respondents,

and

Illinois Central Gulf Railroad Company,

Intervenor-Respondent.

On Petition for Review of Order of Interstate Commerce Commission.

Submitted: October 15, 1980
Filed: February 12, 1981

Before HEANEY, ADAMS,* and STEPHENSON, Circuit Judges.

HEANEY, Circuit Judge.

*The HONORABLE ARLIN M. ADAMS, United States Circuit Judge for the Third Circuit Court of Appeals, sitting by designation.

On February 2, 1980, the Interstate Commerce Commission (Commission) rejected the recommendation of its Administrative Law Judge and authorized the Illinois Central Gulf Railroad Company (ICG) to abandon over 96 miles of track between Cherokee, Iowa, and Sioux Falls, South Dakota—the Sioux Falls District line. After a thorough review of the record, we find that the Commission failed to evaluate ICG's application for abandonment pursuant to the proper statutory standards. Specifically, we hold that the Commission erred by failing to properly balance the competing benefits and burdens of all interested parties, as it was required to do by statute. We also determine that the Commission erred in failing to treat certain train crew wages as "unavoidable costs" when it made its economic computations. We reverse the order of the ICC and remand the case to the Commission to reconsider its earlier order.

I

ICG is a land grant railroad with main lines between Chicago and the Gulf of Mexico. ICG was founded 130 years ago; in 1888, it purchased the Sioux Falls District line from another railroad. In 1962, ICG formed I. C. Industries to acquire, develop and control non-rail business. In 1968, I. C. Industries embarked on a course of substantial diversification which resulted in the formation of five discrete groups: commercial products, consumer products, real estate, financial and transportation. Today, ICG is the wholly owned subsidiary of I. C. Industries.

By 1977, I. C. Industries reported record sales and earnings with a net income of nearly $79 million. Although the transportation group produced thirty-six percent of the revenues of I. C. Industries, only four percent of its pretax income was attributable to this group. On the other hand, the commercial and consumer groups contributed seventy-seven percent of I. C. Industries' pretax income, marketing such products as Pepsi-Cola, Bubble Up, Dad's Root Beer and Midas Mufflers. I. C. Industries has indicat-

ed that these consumer products are becoming the foundation of the long range structure of the conglomerate. Recently, I. C. Industries revealed to its stockholders that, in all likelihood, ICG will be merged or sold at some future date.

The Sioux Falls District line has been used in the past to transport light loading traffic, primarily merchandise shipped in trailers on flat cars ("piggyback traffic") and fresh meat. However, no fresh meat has been transported over the line since December 10, 1977. On that date, ICG received an effective cancellation of its tariff on fresh meat moved in its refrigerated trailers. Less than three weeks later, it filed an application for abandonment.

In 1977, prior to cancelling its fresh meat tariff, ICG moved approximately 30,000 tons of meat traffic. The record indicates that in that year, ICG's largest fresh meat shipper was slowed by a labor strike. The record also indicates that ICG's refrigerated meat cars needed repair or replacement at the time the tariff was cancelled. Grain has been moved on the line in recent years but not in substantial amounts. Some small grain shippers have indicated that they foresee an increasing need for ICG's smaller grain cars.

The Sioux Falls District line has historically been a high speed line, with a maximum freight train speed of 40 m.p.h. for most of its distance, with the exception of a stretch slowed to 30 m.p.h. There is no present need to rehabilitate the track of the Sioux Falls District line. It appears, however, that two bridges along the line will need repair and that the cost of such repair will be approximately $121,540.

II

The Initial Decision of the ALJ

ICG filed its application for abandonment on December 27, 1977, and the case was assigned to Administrative Law Judge

Isabelle R. Cappello for hearing. The ALJ conducted hearings in May and October, 1978. After a careful review of the entire record, she issued her well reasoned opinion denying ICG's application. Recognizing that under the current law the railroad had the burden of establishing that the "present or future public convenience and necessity" required the abandonment of the line, the ALJ ruled that the applicant-railroad had failed to meet this burden. *See* 49 U.S.C. §10904(b)(Supp. II 1978).

In reaching this conclusion, the ALJ weighed the competing benefits and burdens that would ultimately result from abandonment. In essence, she compared the burden that continued operation would impose on the carrier with the adverse effects that abandonment would level upon the shippers and local communities who depend upon the continued operation of the line. *See Chicago & Eastern Illinois R. Co.—Abandonment*, 354 I.C.C. 789, 795 (1978). She rested her opinion on four major points: (1) the line was making a positive contribution to ICG; (2) the carrier's benefit in reinvesting its capital in a more lucrative market was outweighed by the devastating effect abandonment would have on the community; (3) denying abandonment would secure environmental benefits to the affected communities; and (4) ICG made no commitment to funnel the monies it would realize upon abandonment back into ICG's other rail lines.

In assessing ICG's burden of continued operation, the ALJ properly followed the direction of the statute and the Commission's regulations, and compared the revenues attributable to the Sioux Falls District line with the "avoidable cost" of continued operation of the line. She determined that the revenues attributable to the line and the avoidable cost of operating the line for the years 1975-1977 were:

	1975	1976	1977 (9 Mos.)
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs.....	$1,766,393	$1,490,341	$1,180,385
Contribution	$ 387,191	$ 244,534	$ 118,199

The ALJ arrived at these cost figures by deducting from ICG's overall cost of operation those sums attributable to the wages (including health & welfare and payroll tax additives) of the trainmen and train enginemen who run the Sioux Falls District line. The ALJ reasoned that since an enforceable collective bargaining agreement obligated ICG to continue to pay the wages of the Sioux Falls District's two crews indefinitely, regardless of whether the trains moved, this expense was not avoidable upon abandonment. She also deducted those sums attributable to property taxes, reasoning that unless and until the railroad received firm offers for its real estate holdings, it would continue to have to pay property taxes and, therefore, this cost would not be avoided upon abandonment.[1]

The ALJ stated that ICG's cancellation of its fresh meat tariff directly resulted in greatly diminishing traffic over the Sioux Falls District line; this suggested that ICG was artificially building a case for abandonment. Accordingly, she decided that any economic loss suffered by ICG, as a result of the cancellation of its fresh meat tariff, should not be included in the weighing formula.

Administrative Law Judge Cappello noted that the total liquidation value of the Sioux Falls District line was $6.1 million, and that even at a modest nine percent rate of return, ICG could recognize nearly $560,000 yearly on its investment base in the line. She determined that the real reason that ICG sought to abandon the Sioux Falls District line was so that it could divest itself of its holdings in the line and reinvest the realized sum in a more profitable enterprise. Because the carrier made no commit-

[1]The deductions relative to wages were:

1975	1976	1977 (9 Mos.)
$191,237	$236,897	$189,430

The deductions relative to property taxes were:

1975	1976	1977 (9 Mos.)
$ 71,725	$ 60,678	$45,509

ment to reinvest the monies in its other rail lines, she concluded that the benefit of the sale would never be shared by ICG's other rail lines or interstate commerce.

The ALJ considered rate of return on the investment base of the line as one side of the balancing process. She, however, weighed this cost to the carrier against the cost of abandoning an "irretrievable transportation corridor" to the communities and shippers that depend upon ICG's Sioux Falls District line. The ALJ noted that the burden to the affected communities would be significant and would, in fact, be shared with commerce generally. The ALJ's findings in this regard, supported by substantial evidence in the record, may be summarized as follows:

(1) Metz Bakery, South Dakota's largest commercial bakery, has a spur track that connects to the Sioux Falls District line. If the line were abandoned, Metz Bakery would need to convert its plant in order to receive flour by truck at a much inflated cost. This cost would, of course, be passed on to the consumer at the retail level.

(2) Jones Mill and Flour, a small elevator at Rowena, South Dakota, has consistently used small hopper cars on the Sioux Falls District line. If ICG were to abandon its line, it would result in Jones Mill and Flour shipping its grain by truck at an increased cost of twenty-nine cents per bushel for soybeans, twenty-three cents per bushel for corn and over seven cents per bushel for oats.

(3) Citizens of Cherokee, Iowa, opposed ICG's application for abandonment, arguing that it was the area's "last and best line." The other rail carriers that service points on the Sioux Falls District line and transport goods between Sioux Falls and Chicago are more circuitous. The CNW takes four days to make the trip, Burlington Northern three days, and the Milwaukee Road four to seven days. ICG provides overnight service to the same points. The ALJ also noted that the Milwaukee Road is in bankruptcy and that CNW's financial condition is precarious, at best. Furthermore, she stated that it was not wholly clear from the record whether

any carrier other than ICG could handle the piggyback traffic that travels the Sioux Falls District line.

(4) Iowa citizens testified about their need for continued fertilizer shipments along the line proposed for abandonment. Shipping by truck would result in raising the price of fertilizer by $7.00 per ton. One shipper testified that there is a serious shortage of trucks available for hauling fertilizer in the area. One Iowa fertilizer dealer, located on the Sioux Falls District line, Farmer's Co-Op., introduced testimony that it had just completed a 1,200-ton fertilizer storage structure. The Co-Op, which has 268 members, intended to fill the tank twice yearly; the structure's capacity is equivalent to twenty-four 50-ton railroad cars. The Co-Op views abandonment of the line as a disaster.

(5) Burt's Farm Service is a fertilizer and chemical supplier located on the Sioux Falls District line. No other rail carrier serves this shipper; nearby lines of CNW are in disrepair and cannot provide this shipper with assistance.

(6) Ray Halder runs an agricultural lime spreading business. He receives approximately fifty carloads of lime at Calumet from Fort Dodge, Iowa, over the Sioux Falls District line. Abandonment of the line would necessitate Halder's relocating at substantial expense.

(7) The Rock Rapids Community Affairs Corporation developed an industrial site on the Sioux Falls District line and paid for a rail spur. Since the community lost the Rock Island line by abandonment, continued operation of ICG's line would most likely attract industry to the site and increase ICG's revenues as the only available rail carrier.

In the end, the ALJ determined that the scales tipped in favor of those who protested the abandonment. While it would be in ICG's economic interest to reinvest its capital in some more lucrative market, she concluded, "it would not be in the public interest to sacrifice an irretrievable transportation corridor to such busi-

nesses as I. C. Industries currently plans for its structure."[2] Accordingly, she issued an order denying the railroad's application for abandonment.

The Commission's Decisions

An administrative appeal was taken from the decision of the ALJ to Division 1 of the Commission. The panel essentially adopted the ALJ's factual findings but arrived at a contrary conclusion, thus reversing the order of the ALJ and granting the abandonment. The rationale of the panel rested, basically, upon its determination that labor costs and property taxes are avoidable costs as a matter of law. The panel ruled that the Commission had neither the expertise nor the responsibility to interpret private labor-management agreements. The panel further stated: "[n]or can the existence of such a private agreement operate to effect Commission consideration and determination of questions of public convenience and necessity."[3] The panel ruled that

[2]Neither the ALJ nor the Commission specifically addressed the question of opportunity costs. This case was tried to the ALJ and her order was entered (as was the panel's decision) well before the Commission issued its recent policy statement on the use of opportunity costs in abandonment proceedings. At the hearing before the ALJ, no evidence was offered or received on this issue. We are, therefore, not faced with the question raised in *Missouri Pacific R. Co. v. United States*, 625 F.2d 178 (8th Cir. 1980), in which an ALJ refused to permit a carrier to introduce evidence of opportunity costs. Since ICG chose not to produce evidence of opportunity costs below, it will not be allowed to do so now for the first time on appeal. We express no opinion on whether the Commission's policy statement concerning the use of opportunity costs in abandonment proceedings is inconsistent with the Commission's statutory authority or otherwise in conflict with the Interstate Commerce Act, 49 U.S.C. §§ 10903-10905 (Supp. II 1978).

[3]In support of its position, the panel cited its own decision in *Baton Rouge Bus Co.—Abandonment*, 275 I.C.C. 1 (1949), and also *Burke County Ga. v. United States*, 206 F.Supp. 586 (S.D. Ga. 1962).

In *Baton Rouge Bus Co.—Abandonment, supra*, the protestants of an abandonment application argued that the Commission was without jurisdiction to consider the application because the carrier had privately

(footnote continued on following page)

property taxes were avoidable costs upon abandonment, even though ICG had received no firm offers for its real estate holdings, because it could be assumed that ICG would divest itself of these holdings within a reasonably short period of time.

In addition, the panel rejected the ALJ's conclusion that ICG could recapture its meat traffic and increase its grain traffic, stating that such a conclusion was speculative and not supported by the record. It agreed that abandonment would cause some adverse environmental effects, but held that these were not sufficient to offset the economic benefits that would accrue to ICG and in-

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(footnote continued from previous page)
agreed to continue operating the line proposed for abandonment. The Commission correctly disagreed, reasoning that its jurisdiction is controlled by Congress and not by any private contractual arrangements. *Baton Rouge Bus Co.—Abandonment, supra*, 275 I.C.C. at 5.

In *Burke County, Ga. v. United States, supra*, protestants of an application for abandonment asserted that the applicant-railroad should be estopped from securing approval of its plan to abandon because the railroad had given oral assurances to certain affected communities that it would not abandon the line that served their needs. In affirming the Commission's order granting the abandonment, the court stated, "[i]f such agreements operated to prevent the Commission from authorizing abandonment even when the public convenience and necessity favored such authorization, the sole test for abandonment * * * would be thwarted." *Burke County, Ga. v. United States, supra*, 206 F.Supp. at 588 (citation omitted).

It is clear that neither of these cases are controlling here. *Baton Rouge* and *Burke County* dealt with private agreements for *continued service*, and concerned the effect, if any, such agreements have upon the Commission's congressional directive to authorize abandonments when the public convenience and necessity requires such. This case does not raise that issue. Here, the protestants do not argue that the collective bargaining agreement restricts the ICC's jurisdiction, nor do they contend that the railroad is estopped from filing an application for abandonment. Furthermore, the agreement does not require continued operation of the line. The collective bargaining agreement provides that, notwithstanding abandonment, ICG is bound to indefinitely pay the wages of the Sioux Falls District's two crews. The protestants merely argue that, in assessing the benefits of abandonment to ICG, the Commission may not properly treat these wages as benefits, *i.e.*, avoidable upon abandonment.

terstate commerce through abandonment. Finally, the panel dismissed, without visible analysis, the ALJ's findings regarding abandonment's burdens on the community.

The protestants petitioned for administrative review of the decision of the Commission, Division 1. The petition was granted and the Commission affirmed the panel's decision. The full Commission, adopting the rationale of the panel, determined that: (1) the interpretation of a private agreement was not within the scope of the ICC's expertise or responsibility; (2) a private agreement could not control the Commission's determinations regarding public convenience and necessity; and (3) in assessing an application for abandonment, the Commission must compare the revenues attributable to the line with the cost of operating the line as a going concern. In this way, any and all costs of operating the line—even those that could not be avoided upon abandonment—would be compared to the revenues attributable to the line. Furthermore, the Commission redefined the term "avoidable cost" as joint cost, *i.e.*, a cost borne in part by another revenue-raising entity. The Commission reasoned that since the Sioux Falls District line was the only affected revenue-raising entity, all the costs of operation had to be attributed to the line proposed for abandonment and no other. Therefore, since another revenue-raising entity was not available to incur a portion of the costs of operation, there were *no* unavoidable costs. Accordingly, after adjusting the three years' data available, the Commission determined that ICG's Sioux Falls District line was not realizing a profit and authorized abandonment.

III

We begin by noting that the scope of our review of an order of the Interstate Commerce Commission is narrow. *North Dakota State Wheat Comm'n v. United States*, 565 F.2d 621, 626 (8th Cir. 1977). Nevertheless, we are required to thoroughly review

the entire record and carefully examine the Commission's conclusions to determine whether its findings are supported by substantial evidence in the record as a whole, and whether proper legal standards were correctly applied. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-416 (1971); *Burlington Northern, Inc. v. United States*, 549 F.2d 83, 88 (8th Cir. 1977). We note that

> [a] court does not depart from its proper function when it undertakes a study of the record, hopefully perceptive, even as to the evidence on technical and specialized matters, for this enables the court to penetrate to the underlying decisions of the agency, to satisfy itself that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent. "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia." *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272, 88 S.Ct. 929, 935-936, 19 L.Ed.2d 1090 (1968).

Greater Boston Television Corp. v. F.C.C., 444 F.2d 841, 850 (D.C. Cir. 1970) (footnote omitted). *See North Dakota State Wheat Comm'n v. United States*, *supra*, 565 F.2d at 627; *Burlington Northern, Inc. v. United States*, *supra*, 549 F.2d at 88-89. *See also Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 597 (D.C. Cir. 1971). *See generally* B. Schwartz, Administrative Law § 204 (1976).[4]

IV

The two dispositive questions raised in this case are whether the Commission correctly included train and engine crew wages as

[4]Our determination to engage in a searching inquiry of the record to find substantial evidence supporting the Commission's action is required in part because, first, the Commission rejected the result reached by its Administrative Law Judge, and, second, the Commission has admitted that its approach to this area of the law is in a state of confusion. *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

"avoidable costs" in granting ICG's application for abandonment, and whether the Commission properly balanced the interests of the carrier and the affected communities before it authorized abandonment.[5]

Section 1(18) of the Interstate Commerce Act, amended as § 1a and recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978)[6] controls this case. The statute provides in relevant part:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission * * * may (1) abandon any part of its railroad lines * * * only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance. In making the finding, the Commission shall consider whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development.

49 U.S.C. § 10903(a) (Supp. II 1978).

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[5]We affirm the Commission's decision that property taxes may be treated as avoidable costs.

[6]In 1976, Congress enacted the Railroad Revitalization and Regulatory Reform Act (4-R Act) Pub. L. No. 94-210, 90 Stat. 31 (1976); the Act brought about a significant change in the law governing the abandonment of rail lines and discontinuance of service. Before the 4-R Act, the statutory provisions regulating this area were intermingled throughout §§ 1(18)-(22) of the Interstate Commerce Act. The statutory changes reflected in the 4-R Act were codified as 49 U.S.C. § 1(a), and recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The new Act affected abandonment proceedings in three significant respects. First, it expanded the type of public notice that a carrier must post prior to abandoning a line. Second, it provided that states or local communities, as well as shippers who qualify as significant users of a line, could offer financial assistance to a carrier who proposes to abandon a line and, thus, keep the line in operation. Finally, very strict time limits were imposed upon the parties to the abandonment proceeding and also upon the Commission in its processing of the abandonment application. *See generally* Johnson, *The Railroad Revitalization and Regulatory Reform Act of 1976*, 45 I.C.C. Practitioner's J., 27 (1977).

The Act demands that the Commission, in determining the present or future public convenience and necessity, balance the benefits and burdens of abandonment which are ultimately distributed between the carrier, the protestant communities and shippers, and interstate commerce generally. In *Colorado v. United States*, 271 U.S. 153 (1926), the Supreme Court established the basic outline of the statutory scheme:

> The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce.

Id. at 168 (citations omitted); *Missouri Pacific R. Co. v. United States*, 625 F.2d 178, 180 (8th Cir. 1980). *See also Chicago & N.W. Transp. Co.—Abandonment*, 360 I.C.C. 647, 651 (1980); *Seaboard Coastline R. Co.—Abandonment*, 360 I.C.C. 257, 259 (1979).

In November, 1976, the Commission issued its regulations governing abandonment proceedings. The regulations set forth the basic procedural guidelines for abandonment proceedings. *See Abandonment of Railroad Lines and Discontinuance of Service*, Ex Parte 274 (Sub. No. 2), 354 I.C.C. 251 (1976) (hereinafter 49 CFR § 1121 *et seq* (1979)). In addition to carrying the burden of proving that abandonment is in the public interest, the regulations require the carrier to satisfy a lengthy set of procedural prerequisites. They also require the carrier to present specific and accurate cost/revenue data. The Commission uses this data to compare the revenues attributable to the line with the avoid-

able cost of operating the line, mindful that the carrier should recognize a reasonable rate of return on the value of its line. *See Texas & Pac. Ry Co.—Abandonment*, 360 I.C.C. 31, 35-36 (1978); 49 C.F.R. §§ 1121.40-47 (1979). *See generally* Johnson, *The Railroad Revitalization and Regulatory Reform Act of 1976*, 45 I.C.C. Practitioner's J. 35-47 (1977).

V

1. The train crew wages are not avoidable costs.

ICG presented to the ALJ the cost/revenue data required by the regulations. All parties agree that the ALJ's financial data is accurate; the dispute is whether certain crew wages were permissibly deducted from the "costs" side of the formula as "unavoidable." As noted, the ALJ reasoned that, on the basis of the record before her, the wages of two train crews would have to be paid indefinitely as a result of a collective bargaining agreement between ICG and the crew's statutory bargaining representative, regardless of whether the Sioux Falls District line were abandoned.[7] Applying the statutory definition of "avoidable cost"—"all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the

[7] M. S. Stuckey, a representative of the United Transportation Union, testified without equivocation that labor contracts between the railroad and the union required the carrier to assign and pay wages to two crews between Cherokee, Iowa, and Sioux Falls, South Dakota:

> Judge Cappello: Let me see if I understand this. Is it your position that under this agreement the railroad is going to have to assign two crews between Cherokee and Sioux Falls even though the line is abandoned and even though the employees have been placed elsewhere on the line?
>
> The Witness: Your Honor, those were the preexisting conditions at the beginning of the turn of the century, and the company any time—and that's the company's obligation, to—
>
> Judge Cappello: (interrupting) Is your answer yes to my question?
>
> The Witness: The answer is yes.

The only indication to the contrary in this record is an unsworn, unsupported denial by the carrier's attorney.

transportation was provided were abandoned * * *." 49 U.S.C. § 10905(a)(1) (Supp. II 1978)—she concluded that the crew's wages could not be considered "avoidable." After making the proper adjustments, she discovered that the line was making a positive contribution to ICG (*i.e.*, the branch's revenues exceeded its cost of operation).

In reversing the decision of the ALJ, the Commission reasoned that the line had to be viewed as a going concern and that as such it would be irrational not to consider wages as one of the costs of operating the line. The Commission further stated that the concept of an avoidable cost is appropriate only when the carrier's costs are shared between two or more revenue-producing operations. The Commission explained that when one of the line's operations is abandoned and the other continues, then the cost of the continued operation is "unavoidable" and may not be treated as a cost in the revenue-cost formula. It concluded there were no joint costs in this case and, therefore, all costs were avoidable upon abandonment. The Commission erred in so holding.

Avoidable cost is related to the concept of incremental cost. The two terms are distinguishable in that the former is usually applied to retractions in service. Consider the following example:

> Suppose a railroad has just been faced with the proposition of discontinuing a service which obligates it to spend $100 next year and $200 two years from now, but if service were discontinued, its obligation would be $25 per year. The avoidable cost would then be the present value of $75 ($100–$25) discounted one year plus $175 ($200–$25) discounted for two years.

Price & Berardino, *Defining Economic Terms Used in the Railroad Revitalization and Regulatory Reform Act*, 9 Transp. L. J. 133, 154 (1977).

In purely economic terms, avoidable costs are an empirical measure of marginal costs that decrease through reductions or

cessations in output. In the industry, avoidable costs are related to "cash outlays that occur through time." *Price & Berardino, supra* at 155. In this way, avoidable costs are like cash flow statements that reflect cash changes attributable to the elimination of an asset or a particular service. *Id.* Accordingly, by definition, "[a]voidable costs are equal to the savings in resources due to the elimination of a particular activity." *Id.* at 156.

We feel the Commission was obliged to make its economic computations using the terms defined by Congress as its guide. It was not authorized to redefine the term "avoidable cost" as synonymous with "joint cost," and end its discussion there. If the Commission had used the statutory definition of avoidable cost, it would have concluded, as the ALJ properly did, that the wage costs must not be considered avoidable upon the elimination of the Sioux Falls District line.

2. The Commission failed to properly weigh the competing burdens/benefits of both the carrier and the affected communities.

The ALJ recognized that if the line were abandoned and all the properties sold, the money thereby realized could be invested in a more lucrative market, and ICG would realize a significant return on its capital investment in the Sioux Falls District line. She did not believe, however, that this factor should necessarily be determinative of the entire case. She correctly reasoned that Congress intended this factor to be measured against the burden that abandonment would impose on the affected communities and shippers. 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible.

The ALJ was right and the Commission was wrong. Congress did not intend for the Commission to authorize abandonment of

particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress.

Although we think the ALJ correctly complied with the statute and properly balanced the competing interests of all affected parties, we cannot be called upon to affirm her decision on the basis of our independent review of the record. We have no alternative here but to remand this case to the Commission with directions to properly balance the benefits and burdens that would inure to *both* the carrier and the communities upon either abandonment or forced continued operation of the line. We further direct the Commission to articulate, with precision, its conclusions in this regard and issue an order that is capable of proper review by this Court.[8]

ADAMS, Circuit Judge, dissenting.

Although I share the majority's concern for the Iowa-South Dakota region whose economic future is clouded by proposed railroad abandonments, I nevertheless find myself compelled to

[8]We are mindful of the fact that several proposals for railroad deregulation were introduced in the 96th Congress. On March 27, 1979, the Administration's proposals for regulatory reform in the rail industry were introduced in the Senate as S. 796, 96th Cong., 1st Sess., 125 Cong. Rec. § 3498 (1979). Similar proposals were introduced in the House on June 21, 1979, as H.R. 4570. H.R. 4570, 96th Cong., 1st Sess. (1979). The bills, which differed only in minor respects, essentially proposed the repeal of the present requirement that the ICC consider the "serious, adverse impact on rural and community development" in determining the public convenience and necessity. The Administration's proposal suggested that a certificate authorizing abandonment issue when: (a) there are no objections filed to the application, (b) the line's revenues do not exceed the avoidable cost of providing service on the line plus an

(footnote continued on next page)

dissent. For today's opinion rests on what I perceive to be an intrusion by the judiciary into an administrative agency's realm of expertise and policymaking, as well as a misunderstanding of the agency's economic analysis of the proposed abandonments.

I part company from three aspects of the majority opinion: (1) the scope of review, not as articulated, but as actually engaged in; (2) the definition and application of the statutory term "avoidable costs"; and (3) the propriety of our addressing an issue that was not raised by the parties.

While I agree with the majority's statement that the scope of our review of an order of the Interstate Commerce Commission (the Commission), is limited to a determination whether the Commission's findings and conclusions are supported by substantial evidence on the record as a whole, *Illinois Central R.R. Co. v. Norfolk & Western Ry. Co.*, 385 U.S. 57 (1966); 5 U.S.C. § 706(2)(E)(1976), the majority appears to have transgressed this acknowledged restriction. As this Court recognized in one of the first cases to be reviewed under the recent legislation permitting petitions from agency orders to the court of appeals:[1]

> In this circuit a petition for review of a Commission's order will be denied on a summary basis when the order is based on

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adequate return on capital attributable to the line, and (3) the ICC finds that the benefit to the railroad in reinvesting its capital in other more lucrative markets exceeds the detriment to the protestants of the abandonment application. *See generally* Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment*, 11 Transp. L. J. 213 (1979).

Notwithstanding present support in Congress for railroad deregulation, we approach this case guided by the state of the law as it stands today. This case was originated under § 1(a) of the Interstate Commerce Act, recodified as 49 U.S.C. §§ 10903-10905 (Supp. II 1978). We are guided by that statute and our decision rests solely upon that statute.

[1]Pub.L.No. 93-584 §§ 5 and 7 (Jan. 2, 1975) (eliminating three-judge district court procedure for review of orders of the Interstate Commerce Commission). *See also* 28 U.S.C. § 2342.

> the evidence and supported by a rational judgment of the Commission. . . . It is rare that a Commission order is not based on relevant factors or that the exercise of its expertise can be termed such an abuse of discretion as to require reversal by the courts. That such limited review was the intent of Congress is clear.

Warren Transport Inc. v. United States, 525 F.2d 148, 151 (8th Cir. 1975).

Such a posture balances the responsibility to avoid judicial overreaching into areas of discretion and of policy choices that are vested by Congress in the Commission, with our primary duty to review agency decisions so as to ensure conformity with pertinent legal requirements.

It is not, however, within our province to choose between discrepant decisions by the ALJ and the Commission, nor, as the majority seems to suggest, to alter our level of review because the two decisions are contradictory. *See* maj. op. at n.4. The Commission is in no sense bound by the ALJ's decision. In fact, scrutiny of the ALJ's actions is only incidental to our review of the Commission's decisions, *see* 28 U.S.C. §§ 2321, 2342, 2344. Except on matters of credibility, which are not in issue here, the ALJ's conclusion is to be accorded little deference provided the Commission has made an independent evaluation supported by substantial evidence. Thus, as the First Circuit noted in an analogous context, "the question before us is not whether the ALJ's approach was, in our view, better, but simply whether the Commission's method of computing the extent of the carriers' injury was rational." *Bangor & A. R. Co. v. I.C.C.*, 574 F.2d 1096, 1110 (1st Cir. 1978), *cert. denied*, 439 U.S. 837.[2] The majority's proclivity to weigh the desirability or correctness of the ALJ's decision against that of the full Commission, accordingly, would appear to be unauthorized.

[2]This portion of the *Bangor* decision involved the calculation of a damage award against a carrier whose solicitation campaign on behalf of one line unduly prejudiced other connecting lines in the distribution of traffic.

Secondly, I differ from the conception of avoidable costs that is developed in the majority opinion. Contrary to the majority's belief that "[t]he Commission further stated that the concept of an avoidable cost is appropriate only when the carriers' costs are shared between two or more revenue-producing operations," *ante* at 1229, I read the full Commission's decision to state exactly the opposite—that it is precisely when no shared or joint costs exist that avoidable costs are present. Conversely, when joint costs do exist many costs are not avoidable, for the elimination of one operation would leave unaffected the need to continue those costs to support the remaining operation. As the Commission declared, "every ongoing-out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue- producing operation [*i.e.* is not a shared or joint cost] must be considered as part of the cost of the operation proposed for abandonment." 363 I.C.C. at 96. Rather than being synonymous with joint costs, as the majority contends, *ante* at 1229, avoidable costs are defined in opposition to joint costs.

The consequences of my disagreement with the majority on this issue are twofold. Initially, I do not believe that the Commission deviated from the statutory definition of avoidable cost. *Cf.* maj. op. at 1229. As the majority indicates, the recent Railroad Revitalization and Regulatory Reform Act (4-R Act) Pub.L. No. 94-210, 90 Stat. 31 (1976), now codified at 49 U.S.C. § 10903-10905 (Supp. II 1978), provides the governing law for abandonment of rail lines. Section 10905(a) defines "avoidable cost":

> (1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include—
>
> (A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

The Commission's definition of avoidable costs properly reflects the congressional meaning. Instead of parroting the statutory language the Commission, admittedly, spoke of ongoing out-of-pocket costs rather than "outflow incurred." But this did not distort the statutory definition. Nor did the illustration of joint costs do more than illuminate why avoidable costs become problematic in areas of overlapping operations. In fact, the Commission's finding that it "would allow as an avoidable cost . . . only those costs which it was shown would not have to be continued [to support some other service]," 363 I.C.C. at 96, is clearly consonant with the statutory language.

Further, based on the record before us and in light of my view that the Commission rationally interpreted the meaning of the term avoidable costs, I conclude that the Commission did not err in holding the crew's wages avoidable upon abandonment. *Cf.* maj. op. at 1229. All the parties concede that Commission regulation 49 C.F.R. 1121.42 expressly contemplates engine and train crew wages to be avoidable costs so long as they "are incurred solely as a result of the continuation of rail freight service on the branch." The union and petitioners, however, maintain that their wages are not incurred *solely* on account of continued service. They argue that under the collective bargaining agreement—the "tabulated local rule"—the ICG is compelled to pay their wages indefinitely, regardless of whether the rail line exists or is abandoned.

Bearing in mind that our review focuses on whether there is a rational basis for the Commission's conclusion, not whether peti-

tioners and the ALJ's position might also be plausible, I do not find the Commission's analysis of the situation unsupported by the record. The Commission reasoned that the wages were an existing cost:

> Thus, even if it were clearly established that ICG would have to continue the wages of these two train crews for some period of time after shutting down operations . . . it still would not follow that their wages and fringe benefits should be left out of account in assessing the burden on ICG and on interstate commerce of requiring ICG to continue operations on the line.

363 I.C.C. at 97.

Next, the Commission noted that although the wages might have to be treated temporarily as deferred costs of the abandoned operation, such costs gradually would be eliminated. From the Commission's perspective, no one could contend "that [trainmen] will continue indefinitely to be paid for doing nothing. At most it will be until the local [labor] agreement is next renegotiated, or in the extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place." 363 I.C.C. at 98 n.5. The final element in the Commission's determination that the wages were avoidable costs involved a policy choice. Underlying its assessment "that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs when considering the abandonment of a branch line," as the ALJ did, was the recognition that the consequent contorting of the profitability calculation would ultimately discourage such private agreements. That is, if attrition agreements or "tabulated local rules" were viewed as immutable and eternal, they would function to prevent adjustments in rail operations needed to reflect changed public demand as well as to keep railroads out of reorganization proceedings. The public interest would suffer and the objective of protecting labor would eventually boomerang—for carriers would refuse to enter such unrealistic arrangements.

On the record, the Commission's decision to treat crew costs as avoidable is supported by substantial evidence. The regulations define such costs as avoidable; the effect of the collective agreement was in question;[3] and the Commission's policy choice —seeking to balance the goal of stable employment with that of viable railroads, rather than sacrifice the latter to the former— was clearly within the realm of its expertise. There would appear to be nothing arbitrary in the Commission's reasoning that the possible existence of deferred wage costs is neither a valid basis for denying abandonment nor a ground for defining an otherwise unprofitable operation as profitable.

Moreover, I have difficulty understanding how the decision by the majority to uphold the Commission's determination that property taxes are avoidable costs, *see* maj. op. at 1227 n.5, may be reconciled with its decision to reject the Commission's complementary finding that wage costs are avoidable. As with crewmen's wages, the abandonment regulations specifically recognize real property taxes as avoidable costs. Again, the Commission adhered to the congressional definition of avoidable cost: "A cost is avoidable if it can with reasonable certainty be avoided within a reasonable time following abandonment." 363 I.C.C. at 100. And the Commission made explicit that "[t]he principles underlying our earlier discussion of avoidable wage costs are applicable here

[3]The old award decisions cited by petitioners, dating from 1955, 1941 and 1937 concededly guarantee pay for two crews on the line for every working day, regardless of whether the crews are actually used each day, but they do not begin to address any assertion that wages will be paid indefinitely despite cessation of service and abandonment of the line. *See* National Railroad Adjustment Board-First Division, Award 17194 (Docket No. 27306) (October 26, 1955) and National Railroad Adjustment Board-First Division, Award No. 5523 (Docket No. 11522) (March 19, 1941). The union admitted that the agreement did not contemplate abandonment. At most then, the union's testimony amounted to a claim that, given an abandonment, no immediate savings would be realized because the Sioux Line employees have the right to replace lesser-paid junior employees in other areas, or would fill existing vacancies. (P.Br. 1a-16a)

as well." 363 I.C.C. at 100. It is unclear how the Court can find identical principles and analysis permissible with respect to taxes and irrational with respect to wages. Insofar as the Court has failed to distinguish why the Commission's reasoning is appropriate for property taxes but not for wage costs, the agency will, in the absence of further explication, have difficulty on remand fulfilling the mandate "to articulate, with precision" the analysis underpinning its next determination.

As indicated above, I diverge from the majority on a third matter: the propriety of raising *sua sponte* an issue not addressed by the parties. My reluctance to expand judicial oversight is in this instance both informed by the statutory limitations on our scope of review and enhanced by the prospect of penalizing the Commission for properly limiting its response to the sole issue raised by petitioners. As the Commission itself noted, "although [our] determination that the public convenience and necessity permit the abandonment was based upon weighing and valuing a number of factors, petitioners have limited their challenge to the Commission's decision to a single item with respect to the cost side of the equation. Accordingly, we shall limit our defense of the Commission decision to that issue." (R. Brief at 12). Thus, concerns of both an institutional and of a due process nature heighten my disagreement, at the factual level, with the majority's holding that "the Commission failed to properly weigh the competing burdens/benefits of both the carrier and the affected communities." *Ante* at 1229.

Insofar as fulfillment of our obligation to review thoroughly the record as a whole,[4] has led the Court to hold that the Commission did not adequately consider the benefits and burdens of abandonment to the community, an objective perusal of the entire record indicates that the Commission properly performed the statutory

[4] *See Hilt Truck Line, Inc. v. United States*, 532 F.2d 1199 (8th Cir. 1976).

balancing act. It is undisputed that "whether the abandonment or discontinuance will have a serious, adverse impact on rural and community development" is an essential ingredient of the statutory touchstone—whether "the present or future public convenience and necessity require or permit abandonment." 49 U.S.C. § 10903(a)(2). At a minimum, the Commission considered the impact on the community at two points in its order.

With respect to the future need for refrigerated meat service, the Commission affirmed the panel's conclusion that the ALJ's assumption about the recoverability of meat traffic was speculative and unrealistic. In doing so, the Commission relied on the inference that the present decline in demand for refrigerated services is likely to continue, and further noted that no testimony of need was offered by a shipper or prospective shipper. The Commission acknowledged that testimony of a demand for services would be highly probative but regarded the silence in the present proceeding as a reflection of minimal local need. Clearly, the impact on the community was an element in the determination. 363 I.C.C. at 102-03.

The Commission then stated that, "we see no basis for disturbing the panel's ultimate weighing of the factors of public convenience and necessity, which led it to conclude that abandonment should be permitted." This indicates an adoption of the panel's calculus which found that the adverse environmental factors enumerated by the ALJ (small increase in fuel consumption, noise and air pollution) and the economic burdens which abandonment would impose upon shippers and community development were collectively insufficient to offset the economic advantages to ICG and to interstate commerce which would result from an authorization of abandonment. When the panel's determination is combined with the environmental threshold assessment survey[5] adopted by the panel (and which found no negative im-

[5]In conjunction with an application for abandonment the Commission's section of Energy and Environment prepares an Environmental

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pact on industrial development), the record evinces substantial evidence, notwithstanding the ALJ's conclusion that abandonment seems more likely than not to have an adverse impact on rural development, to support the Commission.

Admittedly, the Commission's decision is grounded heavily on the effect that the abandonment or continuance would have on the economic well-being of the railroad. But this is not, as the majority hypothesizes, because the Commission believed "in substance that if the carrier could not operate the branch as a going concern . . . then abandonment would be permissible." *Ante* at 1229. As the Commission explicitly stated, this assessment was only one of the concerns of the abandonment regulations. 363 I.C.C. at 96. The economic burden on the rail carrier was addressed extensively simply because the salient question—whether crew wages were avoidable costs—was inextricably linked to the economic balance sheet of the railroad. Once the Commission agreed with the panel that the ALJ's mischaracterization of wages and property taxes improperly transformed the 1976 and 1977 years' operating losses of $53,000 and $117,000 into profit contributions of $184,000 and $73,000, it had no need to go further. Rather than duplicate the panel's cost-benefit balancing it was permissible for the Commission to adopt the panel's weighing of the relevant statutory factors. Only if the Commission had disagreed with the panel would there have been a need for a reworking of the benefit/burden calculation. In the present proceeding, there is no justification for a remand.

While either a wholehearted commitment to the economic viability of railroads or a more integrated approach to areas threatened by multiple abandonments might be preferable, and

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Threshold Assessment Survey (TAS) which can provide the basis for modifications or conditions on approval of an application. The TAS for the ICG's application concluded that this "abandonment proposal would not significantly affect the quality of the human environment."

might eliminate many of the problems implicit in this appeal, at present it is necessary to work within existing statutory definitions and a circumscribed scope of review that have been ordained by the Congress. Because I believe the majority trenches upon agency discretion and fails to grasp the appropriate relationship between avoidable and joint costs, and because I find substantial evidence to support both the panel's and the full Commission's assessment of avoidable costs and public convenience, I respectfully dissent.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 80-1185 September Term, 1980

City of Cherokee, Rock Rapids Community Affairs Corporation, et al., *Petitioners,* vs. **Interstate Commerce Commission, et al.,** *Respondent.* and **Illinois Central Gulf Railroad Company** *Intervenor-Respondent.*	Petition for Review of Order of Interstate Commerce Commission.

This cause came on to be heard on petition for review of an order the Interstate Commerce Commission, appendix and briefs of the respective parties and was argued.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the order of the Interstate Commerce Commission be, and it is hereby, reversed in accordance with the opinion of this Court.

And it is further ordered by this Court that this cause be, and it is hereby, remanded to the Interstate Commerce Commission for reconsideration consistent with the opinion of this Court.

February 12, 1981

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1185 September Term, 1980

City of Cherokee, et al., *Petitioners,* vs. **Interstate Commerce Commission, et al.,** *Respondents,* and **Illinois Central Gulf Railroad Company,** *Intervenor-Respondent.*	Petition for review of order of Interstate Commerce Commission.

The Court, having considered intervenor-respondent's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 17, 1981

APPENDIX D

F-9860

INTERSTATE COMMERCE COMMISSION

AB-43 (SUB-NO. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABONDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided February 15, 1980

Upon administrative review, findings in prior decision served August 29, 1979 (not printed), authorizing the proposed abandonment affirmed. Train crew labor costs arising out of operation of a branch line which cannot be properly reallocated to other revenue producing operations must be considered avoidable costs of that branch line operation. Real property taxes which can be eliminated with reasonable certainty within a reasonable time following abandonment are properly included within avoidable cost calculations. Ad valorum real property taxes are not necessarily excluded from the category of avoidable costs. The burden of proof to which an applicant in an abandonment proceeding is subject does not impose unreasonable standards. Reasonable inferences can be drawn from evidence produced by an applicant who is in full compliance with Commission abandonment regulations, which inferences require affirmative evidence to rebut.

John H. Doeringer for Illinois Central Gulf Railroad Company.
T. Scott Bannister for Iowa Department of Transportation.
John C. Wiles for South Dakota Public Utilities Commission.
Gordon P. MacDougall for protestants and intervenors.
Marvin Wallace Miller and *Thomas M. Knebel* for intervenors in opposition.

DECISION

BY THE COMMISSION:

On September 18, 1979, a joint petition for leave to intervene in this proceeding as protestants was filed by the city of Cherokee, Farmer's Coop, Calumet Feed Service, K-F Motors, Rowena Elevator & Mill, Rock Rapids Community Affairs Corporation, Metz Baking Company, and Ray Halder Agg Lime Service. In

addition on the same data a separate petition for leave to intervene was filed by C.S. Agro Corp. In view of the prior participation of these petitioners as witnesses in this proceeding, we find good cause has been shown to permit these petitioners to intervene.

In a separate pleading also filed September 18, 1979, the city of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Coop, Archer Coop, Calumet Feed Service, K-F Motor, Metz Baking Company, Rowena Elevator & Mill, Ray Halder Agg Lime Service, L. C. Burkhalter, M. S. Stuckey, B. E. Hudson, and W. H. Canty filed a joint petition for administrative review of the decision of the Commission, Division 1, served August 29, 1979. C.S. Agro Corp. joined in the petition for administrative review. Illinois Central Gulf Railroad Company (ICG) filed a reply to the petition for administrative review on October 4, 1979.

Intervenors seek a determination that this proceeding involves a matter of general transportation importanee. They assert that the failure of division 1 to recognize the full impact of the "tabulated local rule" so as to exclude train and engine crew labor costs from the computation of avoidable costs was erroneous and in conflict with a prior ruling of division 2 in AB-43 (Sub-No. 42), *Illinois Central Gulf Railroad Company Abandonment in Greene, Monroe, Brown, Johnson, Morgan, and Marion Counties, IN* (not printed), decided December 20, 1978. They further assert that division 1 improperly included real property taxes as an avoidable cost and erroneously evaluated the propects for increased traffic on the line proposed for abandonment. They urge that the decision of division 1 which authorized the proposed abandonment be reconsidered and that the abandonment be denied.

In its reply ICG insists that the abandonment regulations of the Commission (49 CFR 1121) as they apply to this proceeding were correctly interpreted in the decision of August 29, 1979, and that the facts support the decision reached by division 1.

We have concluded that the two issues intervenors raise regarding avoidable costs, plus their general issue of burden of proof, present matters of general transportation importance justifying review by the full Commission, because of the large number of abandonment cases in which these and similar issues arise and the confusion and possible conflict between divisions and among Administrative Law Judges which appear to have developed concerning them. Upon such review, the Commission will affirm the conclusions of division 1. Intervenors' third specific issue, regarding future traffic prospects on the line, does not warrant further administrative review, and in this respect the petition for review will be denied. We also will not

disturb division 1's ultimate conclusion that abandonment of ICG's Cherokee-Sioux Falls branch, subject to specified conditions, accords with the public convenience and necessity and should be allowed.

Labor costs.—The intervenors contend that, as a result of the United Transportation Union's (UTU) local collective bargaining agreement with ICG (known as a "tabulated local rule"), the railroad will have to continue paying the wages of the two train crews in question even if it is permitted to abandon the Cherokee-Sioux Falls line. By their interpretation, ICG cannot require the present crews to relocate or accept other duties, and if they do so voluntarily it will still be required to assign two new crews to the line, whether operating or not. Thus, argue the intervenors, the wages and fringe benefits of these train crews are not "avoidable costs" of the branch-line operation. ICG vigorously disputes this interpretation of the agreement, contending that it will not continue to be applicable since ICG's entire Sioux Falls district is proposed to be abandoned.[1]

The Administrative Law Judge accepted the intervenors' argument and disallowed the wages and fringe benefits of the two train crews in her profit-or-loss calculations, thus turning the line's most recent years' operating losses of $53,000 (1976) and $117,000 (1977—9months), as calculated by ICG, into profit contributions of $184,000 and $73,000, respectively (on a capital liquidation value of $6.2 million). These adjustments, together with smaller but still significant adjustments as regards real property taxes (see below), led the Administrative Law Judge to conclude that the Cherokee-Sioux Falls line is profitable and that its continued operation will not be an unwarranted burden on ICG or on interstate commerce.

Division 1 reversed the Administrative Law Judge's findings and conclusions on this point, holding that the Commission's regulations, 49 CFR 1121.42, expressly provide for the inclusion of train crew labor costs in calculating the profitability of branch-line operations for abandonment purposes. The division further held that the effect of the regulations cannot be overcome by a private labor-management agreement such as the "tabulated local rule" here at issue, where the interpretation of the private agreement is in dispute, as it is here. The interpretation of such a private agreement is not within the scope of the Commission's expertise or

[1] A short 2-mile stretch of the 92-mile branch line will be leased to the Cherokee Industrial Corporation for use as an industrial spur line, but this in the applicant's view does not negate its argument.

responsibility, the division held, nor can such an agreement, particularly when in dispute, control the Commission's determination of questions of the public convenience and necessity.

We affirm division 1's decision on this issue, both for the reasons it gave and for another, even more fundamental reason.[2] One of the purposes of our abandonment regulations is to allow us to calculate, as objectively as the nature of the subject will permit, what effect the abandonment or nonabandonment of a particular rail operation will have on the economic well-being of the applicant railroad—keeping in mind that without profits a privately owned rail system such as ours cannot obtain capital to replace and renew its facilities, and thus cannot for long continue to carry on even the most essential of its public services. This purpose requires at a minimum that every ongoing out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue-producing operation, must be considered as part of the cost of the operation proposed for abandonment.

The concept for an "avoidable cost" is necessary because of the prevalence in railroading of joint costs—that is, costs which support two or more revenue-producing operations. When one of these operations is abandoned, the others must henceforth bear these costs since they cannot be eliminated. Thus, to cite a historical example, where an obviously profitable freight service and a questionably unprofitable passenger service were being operated over the same tracks, the Commission would allow as an avoidable cost of the passenger service only those track maintenance costs which it was shown would not have to be continued in order to support continued freight service.

Here, however, there is no possible issue of joint costs. The only service performed by the train crews in question is to operate trains over the Cherokee-Sioux Falls line. Their wages and fringe benefits cannot be reallocated to any traffic other than that transported over the line. If freight rates paid by shippers and receivers on the Cherokee-Sioux Falls line do not cover these wage costs, they will

[2] As noted above, intervenors contend that division 1's decision here is inconsistent with an earlier unpublished decision of division 2 in AB-43 (Sub-No. 42). We note, however, that in the later case the union's interpretation of the existing local labor agreement was not disputed by the applicant. Moreover, the resolution of the wage cost issue was plainly not central to the division's ultimate decision denying abandonment, since the division expressly noted that its decision would be the same even if the disputed wage costs were included. Nevertheless, to the extent that the cited decision may appear to hold that a local labor agreement whose interpretation is not in dispute may be introduced for the purpose of excluding wage and other costs from the "undue burden" profit-or-loss calculations in an abandonment case, that decision is overruled, along with any others of like import.

have to be borne by shippers and receivers elsewhere on ICG's system, to whom they make no contribution, or else by ICG's stockholders. This is precisely what is meant by a burden on the applicant and on interstate commerce.[3] Whether or not the burden is judged to the "undue" depends of course on additional factors which have been fully considered in this case. What concerns us here is that the burden exists and must be recognized.

Thus, even if it were clearly established that ICG would have to continue the wages of these two train crews for some period of time after shutting down operations on the Cherokee-Sioux Falls line, and that it could not immediately assign them to other duties pending a renegotiation of the local agreement, nevertheless it still would not follow that their wages and fringe benefits should be left out of account in assessing the burden on ICG and on interstate commerce of requiring ICG to continue operations on the line. The distortion of reality which results from doing so may be clearly seen in the initial decision. Having by her exclusion of these wage costs turned a clear operating loss into a "profit," albeit a small one in relation to the capital involved,[4] the Administrative Law Judge discusses in the final section of the initial decision (pp. 18-19) the fairness of requiring ICG to accept "a lower rate of return than nonrail properties might generate." But any positive rate of return on investment whatever is strictly imaginary when it results from ignoring the wage costs of operating the Cherokee-Sioux Falls or any other branch line.

Who is going to bear these costs? Surely they cannot be regarded as a gratuity by the railroad or its stockholders. The initial decision never even begins to answer that question, because it ignores these costs not only when finding the Cherokee-Sioux Falls line "profitable" but for all other purposes as well. Yet it is obvious that these costs cannot rationally be imposed upon ICG's other branch-

[3] As regards the ability of ICG's stockholders to bear the costs of unprofitable branch-line operations, we quote the following findings from the initial decision (pp. 2-3): In 1977, ICG had a net income after taxes of $3.3 million, on a stockholders' net equity of $693 million, for a return on equity of less than 0.5 percent. If real estate sales are excluded from profits, ICG in 1977 had a net loss from transportation operations of $23.9 million. No dividends have been paid since December 31, 1976. ICG is controlled by a conglomerate, ICG Industries, which also controls companies manufacturing and selling such consumer products ad Dad's Root Beer and Midas Mufflers. (No way has been suggested of making the consumers of these commodities, which are sold in a freely competitive market, bear the cost of unprofitable branch-line operations by ICG.)

[4] She found the net salvage value of the line to be $6.1 million, consisting of $3.6 million for land and $2.5 million for salvageable rails and other scrap. On this capital investment, the $118,000 she ultimately calculated as the line's contribution to profits in 1977 represents a rate of return of approximately 1.9 percent.

line operations—as we have seen, they are not joint costs in any true economic sense—nor yet on its only marginally profitable main-line operations.

In our view the only rational way these wage costs can be treated is as costs of the particular branch line whose abandonment is at issue. If the line is abandoned and it turns out that ICG is in fact required to go on paying these crews for a time[5] without being able to assign them any other duties, then their postabandonment wages will have to be treated as a deferred cost of the abandoned operation, since these costs cannot rationally be assigned to any other operation. The potential existence of such a deferred cost does not justify ignoring the present wage bill in assessing whether or not existing operations are profitable. If it is concluded that existing operations are unprofitable when wage costs are taken into account, the possible existence of a deferred wage bill simply means that the carrier will not be able to realize immediately the savings inherent in abandonment if permission to abandon is granted. But if permission to abandon is denied or postponed, not only will present costs and losses continue to be incurred, but the incubus of potential future deferred costs will continue to hang over the operation. In other words, the fact that the full savings from abandonment of a lossmaking operation may be deferred for a period of time is not a valid reason for refusing ever to start the period of deferral running.

In this respect there is a close analogy between the asserted effects of this local labor agreement, as interpreted by the intervenors, and the effects of the labor protective provisions that the Commission uniformly imposes in rail merger and abandonment cases. The Commission has long used its regulatory powers to ensure that the burden of needed adjustments in railroad operations does not fall with unreasonable harshness on railroad employees, and this policy is now strongly sanctioned and indeed mandated by statutory amendments to the Interstate Commerce Act in recent years. The invariable result of imposing labor protective provisions is to defer for a period of time some or all of the savings in labor costs which the affected carrier or carriers might otherwise be able to realize. Since these adjustments in operations or authority are normally proposed on the expectation that they will improve the profits or

[5]We say "for a time" because no one contends that they will continue indefinitely to be paid for doing nothing. At most it will be until the local agreement is next renegotiated, or in the most extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place.

reduce the losses of the carrier or carriers involved, the imposition of labor protective provisions is thought to involve no unfairness to the carriers. However, the same analysis that we make above regarding "tabulated local rules" and similar private labor agreements demonstrates that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs when considering the abandonment of a branch line. That indeed would be unfair, and would needlessly sacrifice one statutory policy for another.

By the same token, since public policy supports the cushioning of the effects on employees of needed changes in rail operations of authority through protective provision, so likewise it is in the public interest to encourage private agreements which have a similar effect of stabilizing employment and protecting employees from sudden adverse changes. The existence of such agreements, however—whether called attrition agreements, "tabulated local rules," or any other designation—must likewise not be allowed to prevent those adjustments in rail operations and authority which are otherwise consistent with the public interest and are needed to keep our privately owned railroads out of the bankruptcy courts.[6]

Yet that is precisely the effect of the Administrative Law Judge's decision here to exclude train crew costs in calculating the avoidable expenses of the Cherokee-Sioux Falls line, following her acceptance of intervenors' interpretation of the local UTU-ICG labor agreement. An agreement having (arguably) the desirable effects of stabilizing employment and cushioning the shock of abandonment is thus turned into a source of completely imaginary "profits," on the basis of which ICG is to be deprived of relief from its burdensome service obligations on this little-used and (by any realistic definition) unprofitable branch line. We see this outcome as allowing one statutory objective to be totally sacrificed to another, rather than attempting to reconcile them, as we think the long-term public interest requires.

Real property taxes.—The Administrative Law Judge refused to allow the real property taxes assessed and paid on the right-of-way

[6]This does not, of course, mean that a true joint cost situation cannot be shown—a situation, that is, in which the services of a particular employee or group of employees presently support two operations, only one of which is to be abandoned, and in which it will be impracticable to assign significant new duties to the employee or employees who will have to be retained. Absent evidence of such a true joint cost situation, however, the applicant for abandonment is not required either to show that the employees working solely on the branch line at issue will actually be laid off following abandonment (which as we well know will rarely be the case), or to show precisely what their new duties will be. (See the discussion of burden of proof, below.)

of the Cherokee-Sioux Falls line as avoidable costs, on the grounds that no firm offers had been received for this property. She accordingly reduced the allowance for avoidable costs, and increased the supposed "profit contributions" of the line, by $61,000 in 1976 and $45,500 in 1977 (9 months). Division 1 reversed the initial decision on this issue, pointing out that the abandonment regulations specifically call for the recognition of real property taxes as avoidable costs, and that ICG's witness had testified without contradiction that it intended to sell the right-of-way upon abandonment. The division held that proof of a firm offer or offers for the properties is not a condition precedent to the recognition of real property taxes as avoidable costs.

We affirm the division's conclusion. It would be unreasonable to require an applicant to produce evidence of firm offers to purchase property it proposes to abandon, where the completion of the abandonment proceedings must necessarily result in a long delay in acting on such offers, and where in any event there is little reason to doubt that such property can be sold. The Administrative Law Judge was apparently concerned that, in the absence of firm offers, it is not completely certain that the applicant will be able to sell the property and thus terminate its liability for taxes on "Day One" following abandonment. That is not the test. A cost is avoidable if it can with reasonable certainty be avoided within a reasonable time following abandonment. Thus the fact that ICG might go on paying real estate taxes for some months or even years while awaiting a satisfactory purchase bid for some part or all of the property does not exclude these taxes from the category of avoidable costs. We find no basis in the record for any serious question as to the salability of the property in question;[7] and even if some particular portion were ultimately to prove unsalable for nonrailroad purposes, ICG could simply cease paying the taxes on that portion and allow it to be sold for taxes, thus terminating the out-of-pocket expense.

The principles underlying our earlier discussion of avoidable wage costs are applicable here as well. The right-of-way and other real property of the Cherokee-Sioux Falls line contribute nothing, so far as the record shows, to any other transportation operation of ICG, nor can they reasonably be borne by shippers and receivers whose

[7]We note that the Administrative Law Judge found no difficulty in placing a salvage value of $3.5 million on the real property in question (initial decision, p. 8). This necessarily implies its salability for nonrailroad purposes; otherwise the value would be zero.

goods do not move over the line. Thus any delay in terminating the expense of taxes on this property after abandonment, whether voluntary or involuntary, can only be treated as a deferred cost of the abandoned branch operation. The possible existence of such deferred costs, we have shown, is not a valid basis for denying abandonment, nor does it render "profitable" an operation which is otherwise unprofitable.

In their petition the intervenors assert a separate ground for disallowing a portion of these taxes different from that adopted by the Administrative Law Judge. They state that in South Dakota the taxes in question are ad valorem taxes, which they say "customarily are disallowed in line abandonment and service discontinuance proceedings." (Petition, pp. 7-8.) This represents a misunderstanding by intervenors. There is no special magic in the words "ad valorem" which take real property taxes out of the category of avoidable costs. Such taxes are not avoidable only where it is shown that, although in form local taxes on the value of property, they are actually assessed on the basis of statewide factors such as gross receipts which in the specific instance make it unlikely that the abandonment of a lightly used branch line will result in more than a *de minimus* reduction in the railroad's statewide tax bill. In the leading case on this point, *Chicago & N. W. Ry. Co. Abandonment,* 275 I.C.C. 759, 771 (1951), such a showing was clearly made. The record here discloses no such showing. Indeed, it affirmatively shows the contrary. The Cherokee-Sioux Falls line represents ICG's sole operation in the State of South Dakota. When it is abandoned and the right-of-way sold, South Dakota will no longer have jurisdiction to levy any form of taxes on ICG, and the specific taxes at issue will clearly not continue to be paid.

Burden of proof.—At each point in their argument, intervenors reiterate that the applicant railroad has the burden of proof throughout an abandonment proceeding. That is a correct proposition, but unreasonable conclusions must not be drawn from it. The applicant has the ultimate burden of convincing the Commission, upon all of the evidence, that abandonment is consistent with the public convenience and necessity, and should be authorized. It also has the burden of producing the detailed evidence called for by the Commission's abandonment regulations, covering every principal element of its case-in-chief for abandonment. Further, it must respond to protestants' requests for discovery of additional relevant and material data in its possession, and must allow them, through cross-examination of competent and

knowledgeable witnesses which it must produce, to test and where possible rebut its case. But the applicant, having gone this far, is entitled to have reasonable inferences drawn from its evidence unless and until rebutted,. It is not held to the impossible standard of proving by affirmative evidence the negative of every proposition the protestants may choose to advance, regardless of how little evidence they adduce in support of that proposition.

This case presents an example of what we are talking about.[8] The Administrative Law Judge held that ICG should be able to regain the large volume of fresh meat traffic shipped in railroad-owned refrigerated truck trailers that it formerly enjoyed out of Sioux Falls, even though no shipper testified at the hearing that it currently needs or desires such service. Division 1 considered the Administrative Law Judge's assumption that this traffic was recoverable was both speculative and unrealistic, in the absence of supporting shipper testimony.[9] Intervenors' argument now is that division 1 erred because ICG has the burden of proof: "It is for the carrier to show that the business cannot be regained." (Petition, p. 8.)

We think this carries the principle of the applicant's burden of proof to a ridiculous extreme. Having shown the steady drop-off in traffic on the Cherokee-Sioux Falls line in recent years, and having fully explained the circumstances under which it canceled its refrigerated meat tariff, ICG was entitled to rely on the inference from this evidence, often stated in our abandonment decisions, that future traffic trends are likely to be a continuation of past ones—an inference we believe is justified unless and until affirmative evidence to the contrary is introduced. Shipper testimony as to future transportation needs and desires is highly probative to that end, though of course not conclusive if disputed; but in the absence of such testimony, it was error for the Administrative Law Judge to indulge in speculation as to future traffic possibilities. It would be

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[8] Although intervenors argue the labor cost issue as if it was a question of burden of proof, we do not see it primarily as such. As our earlier discussion makes clear, we would take train crew costs into account in calculating the profitability of the line at issue for abandonment here even if it were conclusively shown that under the local labor agreement ICG would have to go on paying these crews for a time and could not assign them any other duties. Thus the question of who has the burden of showing the provisions and proper interpretation of the labor agreement does not arise, because the agreement is simply irrelevant to the matter at issue.

It is possible the Administrative Law Judge saw the real property tax issue as one of burden of proof, although the initial decision does not so state. If so, we hold the burden she imposed on the applicant to be an unreasonable one, as our discussion above makes clear.

[9] The division 1 decision refers to this as "frozen meat traffic." Actually the meat in question is not frozen but refrigerated.

quite unreasonable to demand that the applicant must produce evidence that shippers and receivers do *not* desire or need a particular service they are not currently receiving, when there is no testimony in the record that they do.

Our abandonment regulations are highly relevant to the issue of burden of proof. The present version of these regulations[10] was adopted both to implement the specific legislative requirements of the 4R Act and to introduce an increased degree of objectivity and uniformity into abandonment proceedings, particularly with regard to the revenues and costs which should be taken into account in appraising whether or not the operations proposed for abandonment have been or will be burdensome to the applicant and to interstate commerce.[11] We hold that when an applicant has complied fully with these regulations, has produced in evidence the detailed data they call for, and has produced competent witnesses to explain and defend its exhibits, it has met its initial burden of going forward with the evidence, particularly as to those financial and accounting matters which the regulations deal with in great detail.

In our decision adopting these regulations, cited above (354 I.C.C. at 132), we said that they were basically procedural in nature—but the burden of going forward with the evidence is in this sense essentially a procedural matter.[12] Thus, the fact that a particular item such as train crew wages or real property taxes is specifically recognized by the regulations as being includible in avoidable costs does not create a conclusive presumption—it does not, that is to say, preclude a showing by protestants that, in the specific circumstances at issue in a particular case, certain specified costs of this nature are in fact not avoidable. (For example, protestants are entitled to show that the wage costs in question are true joint costs shared with another operation not proposed for abandonment; or that the taxes in question will continue to be assessed against operations not to be abandoned.) But we hold it is for protestants to raise these issues and to rebut the inference created by the applicant's compliance with the regulations and presentation of evidence, either by independent evidence or by cross-examination of the applicant's witnesses. An applicant that has complied with the regulations should not be held to have failed in its

[10] *See Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129 (1976).

[11] Under the 4R Act, these same calculations are also important in pursuing the option of subsidizing continued service in the event abandonment is authorized.

[12] As indicated previously, the ultimate burden of persuasion as to whether abandonment should be permitted never shifts from the applicant.

burden of proof because it does not go further and, for example, produce evidence of firm offers to purchase its real estate.[13]

Future traffic prospects and ultimate conclusions.—Apart from the issue of burden of proof dealt with above, we do not consider that division 1's reversal of the Administrative Law Judge's conclusions as to the future traffic prospects of the Cherokee-Sioux Falls line presents any issue of general transportation importance, and accordingly we will not disturb the division's findings on this issue. The importance of the issue is greatly reduced, of course, by our affirmance of the division's findings on the cost issues, which serve to demonstrate that the line was significantly unprofitable even *before* ICG canceled its refrigerated meat tariff, and thus lost the traffic which the Administrative Law Judge believed it could regain. Similarly, we see no basis for disturbing division 1's ultimate weighing of the factors of public convenience and necessity, which led it to conclude that abandonment should be permitted.

This decision does not significantly affect the quality of the human environment.

It is ordered:

1. We grant the petitions for leave to intervene.

2. We grant the petition for administrative review of the decision of the Commission, Division 1, in this proceeding served August 29, 1979, with respect to the issues of train and engine crew labor costs, real property taxes, and burden of proof, and deny the petition in all other respects.

3. On the issues as to which review is granted, we affirm the aforesaid decision of the Commission, Division 1.

4. This decision and the decision served August 29, 1979, shall become effective 7 days from the date this decision is served.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Stafford, Clapp, Trantum, and Alexis. Commissioner Stafford concurred in the result.

AGATHA L. MERGENOVICH,
(SEAL) *Secretary.*

[13] As indicated in a earlier footnote, it is not clear that burden of proof was the basis for the Administrative Law Judge's disallowance of real property tax costs here; but if that was the basis, it was error.

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

NO. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX, AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: August 24, 1979

On December 27, 1977, the Illinois Central Gulf Railroad Company (ICG) filed an application to abandon its Sioux Falls District line of railroad which extends between milepost 0.0 at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD. The line traverses points in Cherokee, O'Brien, Sioux, and Lyon Counties, IA, Rock County, MN, and Minnehaha County, SD. In an initial decision served February 6, 1979, the Administrative Law Judge denied the application.

An administrative appeal from the initial decision was filed jointly by ICG and the Iowa Department of Transportation (IDOT). Replies to the administrative appeal were filed jointly by four officials of the United Transportation Union (UTU) and separately by the South Dakota Public Service Commission (SDPUC).

In denying the application, the Judge concluded that the revenues generated over the Sioux Falls District had been sufficient to contribute to the profits of ICG in the prior years for which there was data on the record, and that with appropriate policy adjust-

ments revenues would be sufficient to maintain profitable operations. These conclusions were based upon certain adjustments made by the Judge to the avoidable cost figures submitted by ICG and certain assumptions as to the recapture and increase in volume of lost traffic.

Specifically, the Judge disallowed consideration of the labor cost for enginemen and trainmen operating between Cherokee and Sioux Falls and property taxes associated with the subject line. With regard to the labor cost, the Judge noted a UTU interpretation of an existing labor agreement between UTU and ICG known as a "tabulated local agreement". This interpretation of the agreement holds that the railroad is obligated to pay crew costs notwithstanding an authorized abandonment of the line. The Judge concluded that ICG had failed to satisfactorily establish that approval of the proposed abandonment would result in a savings of these labor costs for ICG.

As to the property taxes, because the record failed to reveal any firm offers for the property, the Judge determined that these taxes could not be recognized as an avoidable cost.

Turning to the subject of revenues, the Judge, while acknowledging a significant decline of traffic over the line, found this to be the direct result of ICG's actions in relinquishing its fresh meat traffic. The Judge concluded that this traffic could be recaptured if ICG would secure appropriate equipment to service fresh meat shippers. The Judge further concluded that while grain movements, which had never been substantial over the Sioux Falls District, had been lost to lines capable of handling large unit trains, sufficient traffic could be recaptured, and new traffic regenerated, to maintain a profitable operation if ICG would offer attractive rates to grain shippers in need of small grain cars.

Appellants direct their administrative appeal to those findings of the Judge which lend support to the conclusion that ICG has

reasonable prospects for operating its Sioux Falls District at a profit. They particularly object to the disallowance of train and engine crew wage and fringe benefits and real property taxes as variable costs attributable to the operation of the line. They also object to the conclusion that sufficient fresh meat traffic can be recaptured and grain traffic attracted to enable ICG to maintain profitable operations over the line. With regard to the labor cost disallowance, appellants contend that the Judge improperly relied on testimony given in another proceeding which had been brought to the attention of the Judge in the post hearing brief filed by UTU.

DISCUSSION AND CONCLUSION

The initial decision contains a detailed discussion of the facts which, except as supplemented or modified in this decision, are adopted as our own. From our examination of the facts, however, our findings differ from those of the Judge. We conclude that the proposed abandonment should be authorized.

Turning first to the testimony given in a prior proceeding, we believe that the subject matter of the testimony and the manner and circumstances in which it was introduced into this proceeding was such that it was within the prerogative of the Judge to give it consideration. The subject of the testimony was an interpretation of the meaning and effect of a "tabulated local agreement". It was offered by a witness who appeared on behalf of applicant in this proceeding but was not questioned on this record by either applicant or protestants with regard to this subject. The testimony was appended to the post hearing brief submitted by UTU and lent support to the position advocated by UTU as to the effect of a "tabulated local agreement".

While the subject testimony was not submitted in accordance with Rule 80 of the Commission's General Rules of Practice, no challenge or objection to the post hearing brief or appended tes-

timony was offered by appellants. It is appropriate for the Commission to take Official Notice of testimony given in one of its proceedings. As the appended testimony purported to offer an interpretation of a labor-management agreement which the Judge felt was significant to this proceeding, we believe that it was within her prerogative to reflect upon and give consideration to this testimony.

Notwithstanding our conclusion that consideration can be given to the testimony appended to the UTU post hearing brief, we do not agree that train and engine crew labor costs have been properly excluded as avoidable costs. The Commission in developing its standards for determining avoidable costs for providing service over rail properties carefully recognized common variable costs, *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 129, 156. Included among the avoidable cost items identified in the Commission's current regulations under the heading "Calculation of avoidable costs" (within the operating expense group "(c) Transportation") are the salaries and wages for engine crews and train crews assigned to previous Account Nos. 392 and 401. 49 CFR 1121.42 (1978). The totals contained in the latter two accounts were excluded from consideration by the Judge.

The exclusion was based upon an interpretation as to the effect of the "tabulated local agreement" upon the proposed abandonment, an interpretation which ICG vigorously disputes. The disputed "tabulated local agreement" is a private labor-management agreement between UTU and ICG. The interpretation of a private labor-management agreement is not within the purview of the Commission's expertise or responsibility. Nor can the existence of such a private agreement operate to effect Commission consideration and determination of questions of public convenience and necessity. *Burke County, Georgia* v. *United States*, 206 F. Supp. 586, 588 (1962); *Baton Rouge Bus Co. Abandonment*, 275 I.C.C. 1, 5 (1949). In the face of existing Commission regulations which clearly accept and recognize train engine crew

labor costs as avoidable costs, the existence of a private "tabulated local agreement", the effect of which is in dispute, cannot provide a basis upon which to challenge the avoidable nature of these expenses.

Because labor crew services rendered in operating a line between Cherokee and Sioux Falls must be attributed to operations between Cherokee and Sioux Falls, such labor crew costs are avoidable costs arising out of the Cherokee-Sioux Falls operation and will be so recognized in our deliberations in this proceeding.

Commission abandonment regulations also recognize real property taxes as avoidable costs, 49 CFR 1121.42(j). A review of the record indicates that it is the intention of ICG to liquidate the properties in its Sioux Falls District if abandonment is authorized in this proceeding. A firm offer for these properties is not required as a condition for treating these expenses as avoidable costs. The real taxes were properly identified by applicant as avoidable costs, and we recognize them as such.

As to the Judge's conclusions regarding ICG's possibilities for recapture and increase of traffic, we believe the Judge's views to be unduly optimistic and not supported by the record. To assume that frozen meat traffic can be recaptured in the face of a complete absence on the record of shipper witnesses expressing a desire for this service is both speculative and unrealistic. Similarly, the probability of a significant increase in grain traffic appears quite remote, even with an adjustment in the ICG rate structure for small grain shipments, when it is recognized that grain movements over the Sioux Falls District have never been substantial. We conclude that ICG can not reasonably anticipate a significant increase in revenues from operations over its Sioux Falls District, particularly revenues arising out of fresh meat and grain traffic.

Traffic over the Sioux Falls District has been steadily declining since 1974 as is indicated in the following chart:

YEAR	# OF CARLOADINGS
1974	7,400 approx.
1975	4,816
1976	3,744
1977	3,429
1978 (6 Mo.)	1,063

ICG's revenue/cost figures summarized on page 6 of the initial decision provide an accurate reflection of the financial results of its recent past operations over the Sioux Falls District and indicate an ominous trend for the future. Calendar year data indicate a $124,229 profit for 1975, a $53,041 loss for 1976, and a $116,740 loss for the first 9 months of 1977. Fiscal year totals indicate a profit of $24,596 for the period ended June 30, 1976, and a loss of $133,122 for the period ended June 30, 1977. Without fresh meat traffic (movements of fresh meat traffic terminated in December 1977) operations for the fiscal year ended June 30, 1977, would have resulted in a loss of $493,672.

Upon evaluating the evidence in light of factors discussed above, we believe that continued operation of the Sioux Falls District will impose an undue economic burden upon ICG, an economic burden which the inconvenience and additional expense to shippers and adverse impact on rural and community development in the area cannot offset. We adopt the environmental threshold assessment survey (TAS) prepared by the Commission's Section of Energy and Environment (SEE). Although we are not in full agreement with the Judge's evaluation of the TAS, we accept the Judge's conclusions as to the adverse environmental factors which will result from approval of the proposed abandonment. Considering these adverse environmental factors in conjunction with the economic burdens which abandonment will impose upon shippers and community development, we must conclude that they are collectively insufficient to offset the economic

advantages to ICG and through ICG to interstate commerce which will result from an authorization of abandonment in this proceeding.

By supplemental addendum to the TAS dated October 17, 1978, the SEE recommended the imposition of certain conditions to avoid or mitigate potential adverse effects upon certain historic properties located on the subject line in the event that abandonment was authorized in this proceeding. The properties were identified as the passenger depot at Sioux Falls, SD, and the Bastian Archeological site near Cherokee, IA. The passenger depot has been identified by the United States Department of Interior (Heritage Conservation and Recreation Service) as a property eligible for inclusion in the *National Register of Historic Places.* The Bastian Archeological site is presently included in the *National Register.* Pursuant to section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 470f, as amended, 90 Stat. 1320) a Memorandum of Agreement was adopted by representatives of the Commission (the SEE), the Advisory Council of Historic Preservation, and the Historic Preservation Officers of the States of Iowa and South Dakota. The Memorandum to Agreement urged the Commission to adopt the conditions proposed by the SEE in the event that the proposed abandonment is authorized. The proposed conditions are directed at promoting the preservation of our historic and cultural resources, objectives which are consistent with the mandates contained in the National Environmental Policy Act and the National Historic Preservation Act. The requested conditions will be imposed.

We find that the present and future public convenience and necessity permits the abandonment by Illinois Central Gulf Railroad Company of its Sioux Falls District line of railroad extending between milepost 0.0 at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD. To protect the interests of employees who may be affected by this authorization to abandon, the conditions set forth in *Oregon Short Line R. Co. Abandonment-Goshen,*

(Oregon III), 360 I.C.C. 91 (1979), will be imposed should applicant effectuate the proposed abandonment. We further find this decision is not a major Federal action significantly affecting the quality of the human environment, nor is it a major regulatory action within the meaning of the Energy Policy and Conservation Act of 1975.

It is ordered:

1. Abandonment by the Illinois Central Gulf Railroad Company of its Sioux Falls District line of railroad extending between milepost 0.0. at Cherokee, IA, and milepost 96.47 at Sioux Falls, SD, is authorized, subject to the conditions for the protection of employees set forth in *Oregon Short Line R. Co.-Abandonment-Goshen*, (Oregon III), 360 I.C.C. 91 (1979).

2. Any certificate of abandonment issued by virtue of the authorization stated in paragraph (1) shall include and be subject to the following conditions:

(a) The Illinois Central Gulf Railroad Company shall notify the Iowa Historical Society at least 30 days prior to undertaking efforts to salvage track located in the vicinity of the Bastian Archeological site to allow the society to secure the services of a trained archeologist to monitor the salvage operations.

(b) The Illinois Central Gulf Railroad Company shall not sell, lease, exchange, or otherwise dispose of the right-of-way underlying the track located in the Bastian Archeological site, including all bridges and culverts, for a period of 120 days following the issuance of the certificate unless this property is first offered, upon reasonable terms, to public authorities or other responsible persons interested in acquiring the property for public use.

(c) The Illinois Central Gulf Railroad Company shall include in any contract for sale of those portions of its right-of-way within which the Bastian Archeological site is located, a provision requiring the purchaser to

notify the Iowa Historical Society of their plans for the property.

(d) The Illinois Central Gulf Railroad Company shall maintain the Sioux Falls passenger depot for a period of time not to exceed 180 days from the date of issuance of the certificate. During this time it shall take reasonable steps to prevent significant alteration or deterioration of the station and afford to any public agency or private organization wishing to acquire the station for public use the right of first refusal for its acquisition.

(e) In the event that the Illinois Central Gulf Railroad Company plans to demolish the Sioux Falls depot or sell it for a use which would adversely affect its historic qualities, it must document the building in accordance with the standards of the Historic American Buildings Survey. The extent and nature of such documentation is to be developed in consultation with the Historic American Buildings Survey. Copies of the documentation are to be provided to the Historic American Buildings Survey and the South Dakota State Historic Preservation Officer for inclusion in their respective archival collections.

(f) The Illinois Central Gulf Railroad Company shall notify the South Dakota Department of Educational and Cultural Affairs, Historical Preservation Center (HPC), of its plans for the Sioux Falls depot. If the Illinois Central Gulf Railroad Company sells the property, it shall include in its contract of sale a provision requiring the purchaser to notify the HPC of its plans for the structure. The purpose of this condition is to provide HPC with notice of any proposed plans. It does not subject any proposed plan to approval by HPC.

3. In the event any person or government entity is considering an offer of financial assistance to enable the subject rail service to be continued, the offeror should comply with 49 CFR 1121.38(b). Within 10 days after receiving appropriate notification that an offer of financial assistance is being considered, applicant shall comply with the information requirements of 49 CFR 1121.38(e).

4. All correspondence to the Commission with respect to offers of financial assistance for the continued operation or acquisition of the subject line shall contain an appropriate reference to this proceeding, and the following notation shall be typed in boldface on the lower left-hand corner of envelopes containing such correspondence: "Section of Finance, AB-RSCP".

5. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. Applicant shall not effect any abandonment or discontinuance of service prior to the effective date of the certificate of abandonment.

6. This decision will be effective 30 days from the date it is served.

By the Commission, Division 1, Commissioners Clapp, Stafford, and Trantum.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

Docket No. AB-43 (Sub-No. 47)

ILLINOIS CENTRAL GULF RAILROAD COMPANY ABANDONMENT BETWEEN MILEPOST 0.0 AT CHEROKEE, IOWA AND MILEPOST 96.47 AT SIOUX FALLS, SOUTH DAKOTA, IN CHEROKEE, O'BRIEN, SIOUX AND LYON COUNTIES, IOWA, ROCK COUNTY, MINNESOTA, AND MINNEHAHA COUNTY, SOUTH DAKOTA

Decided: January 12, 1979

By application filed on December 27, 1977 the Illinois Central Gulf Railroad Company (ICG or applicant) seeks an order, under Section la of the Interstate Commerce Act (49 USC 10903(a)), finding that public convenience and necessity permit the abandonment of applicant's Sioux Falls District, from Milepost 0.0 at Cherokee, IA, to Milepost 96.47 at Sioux Falls, SD, and a certificate authorizing the abandonment. The application includes all yard and side tracks. Notice of the abandonment was posted and served as required under the Act and applicable regulations.

A hearing on the application was held on May 8, 9, and 10, in Cherokee, IA. Appearing in protest to the application were the South Dakota Public Utilities Commission (SDPUC), officials of the United Transportation Union (UTU), various public witnesses from Iowa and South Dakota, and the Transportation Regulation Board of the Iowa Department of Transportation (IDOT). At the commencement of the hearing, the Acting Chief

Counsel for IDOT announced that IDOT had decided to support the ICG application, except for a two-mile segment between Milepost 0.0 and 2.0. On May 9, IDOT announced that an agreement had been finalized between the ICG, the Cherokee Industrial Corporation, and Hy-Vee stores, whereby ICG will lease the first two miles of the Sioux Falls District, following its abandonment, to Cherokee Industrial Corporation for use as an industrial spur for service, as may be needed, to an industrial park area. As a result of the agreement, IDOT withdrew its objections relative to the abandonment, and actively supported the proposal at the hearing.

The Commission's Section of Energy and Environment filed a threshold assessment survey (TAS) on August 3, 1978, and two addendums thereto, one on October 5 responding to public comments on the TAS, and one on October 17, concerning historic sites and buildings. On October 26, a hearing was held on the environmental issues.

Briefs have been filed following both the May and October hearings. All contentions made in the briefs have been considered in reaching this decision.

FINDINGS

I. Condition of the ICG

ICG is the predecessor of the Illinois Central, a land-grant railroad with main lines between Chicago and the Gulf of Mexico, and a wholly-owned subsidiary of IC Industries. ICG was founded 127 years ago; purchased the Sioux Falls District in 1888 from another railroad; and is the predecessor company of IC Industries, which was founded in 1962 to acquire and control non-rail business. Substantial diversification began in 1968; and activities now include five discrete groups—commercial products, consumer products, real estate, financial, and transportation. In 1977, IC Industries enjoyed record sales and earnings, with a net income of nearly 79 million dollars. It had a favorable debt-to-

capitalization ratio in 1977 of 37.9 percent compared to 37.7 in 1976. As of December 31, 1977, it had credit lines of 269.5 million dollars. In 1977, 36 percent of the revenues of IC Industries came from the transportation group of companies, but only 4 percent of its pretax income. The commercial and consumer groups contributed 77 percent of IC Industries' 1977 pretax income and include such products as Pepsi-Cola, Bubble Up, Dad's Root Beer, and Midas Mufflers. Such products are becoming the foundation for the long-range structure of IC Industries. IC Industries has informed its stockholders that while it intends to operate ICG on a profitable basis, in all likelihood ICG will be merged or sold at some future date.

In its 1977 Annual Report to stockholders, IC Industries heralded as a "major accomplishment in 1977" the "strong turnabout and return to profitability of the IC Transportation Group." See page 3 of Exhibit 10. ICG is the group's primary operating company. The only other company in the group is Chicago & Illinois Western Railroad. Under the accounting basis used by I.C.C., ICG had a net income of $3,339,000 in 1977. Pretax transportation income of ICG, in 1977, was $4,741,000. In addition, ICG enjoyed considerable income from real estate sales in 1977. In 1977 ICG, under provisions of the Railroad Revitalization and Regulatory Act of 1976, issued $12,360,000 of non-voting redeemable preference shares to the United States of America. Funds from these shares are to be used for certain track rehabilitation projects. An additional 12 million dollars worth of shares is already committed under this Act.

As of December 31, 1977, ICG had current assets of $159,134,000 and current liabilities of $151,499,000. On the asset side, it had capital and other special funds of $12,506,000; $49,169,000 in investments; $1,109,623,000 in properties; and other assets and deferred charges of $24,104,000. On the liability side, it had long-term debt due in one year of $33,322,000; long-term debt due after one year of $386,539,000; casualty and other

reserves of $12,296,000; other liabilities and deferred credits of $78,321,000; shareholder's equity of $692,559,000; and retained income of $414,420,000. See pages 1 and 2 of Appendix D to Exhibit 7.

ICG's net income from transportation reached a high point of $32,710,000 in 1973 (the year IC Industries purchased Bubble Up). It has declined sharply since that time. Were it not for real estate sales, ICG would have suffered a loss in 1975 of $16,191,000, in 1976 of $21,447,000, and in 1977 of $23,914,000. No dividends have been paid since December 31, 1975.

ICG shows a working-capital deficit of 25.7 million dollars in 1977, a deficit of 31.1 in 1976, and a deficit of 43.3 in 1975. As of December 31, 1977, IC Industries had advanced ICG a net of $7,617,398. See page 5 of Exhibit 7.

ICG has an abandonment program underway to abandon what it regards as "uneconomic trackage." See page 23 of Exhibit 10. It has received final or conditional authority to abandon 854 miles; and 946 additional miles are the subject of already-pending, abandonment applications to this Commission.

II. Traffic Over the Sioux Falls District

The Sioux Falls District has historically been used to transport light loading traffic, mainly merchandise shipped in trailers on flatcars (TOFC or piggyback traffic) and fresh meat. In the first six months of 1978, however, no fresh meat has moved over the line. This is because ICG chose to cancel its tariff on fresh meat moved in ICG refrigerated trailers. The cancellation became effective on December 10, 1977. Prior to this tariff cancellation, Iowa Beef Packers shipped a substantial amount of meat over the Sioux Falls District (from Luverne, MN, via highway to Sioux Falls) in refrigerated trailers furnished by ICG. The meat was destined to markets on the East Coast. The meat trailers wore out. Damage claims were very high. Iowa Beef Packers suffered a

strike in 1977 and was not shipping as much as before. Accordingly, ICG elected not to replace the old trailers with new ones; and it cancelled its meat tariff. As a result, ICG carries no meat today in its own refrigerated trailers, from Sioux Falls. In 1977 ICG carried 30,000 tons of meat traffic. A small amount of fresh meat and some canned meat still originates at Sioux Falls and moves over the line in refrigerated cars owned by Morrell Packing Company, which has a Sioux Falls plant.

The Sioux Falls District has never originated any substantial movements of grain. Generally, grain shippers prefer to use 100-ton cars, in unit trains, which are more economic but too heavy for the Sioux Falls District. Corn, grain, and soybeans accounted for 832 loads in 1974, 183 in 1975 (a drought year), 28 in 1976 (another drought year), 37 in 1977, and 51 in the first six months of 1978.

The following chart illustrates the decline in traffic over the Sioux Falls District:

	Total loadings	S. Dakota loadings*
1974	approx. 7400 cars	6188 cars
1975	4816 cars	4212 cars
1976	3744 cars	3339 cars
1977	3429 cars	3020 cars
1978 (6 mo.)	1063 cars	894 cars

*Sioux Falls and Rowena carloads, mostly Sioux Falls. The relinquishment by ICG of its fresh-meat business (by the cancellation of its fresh-meat tariff) contributed greatly to this decline.

III. Condition of the Line Proposed for Abandonment

ICG operates freight trains six days a week, in both directions, over its Sioux Falls District. One crew of four, sometimes five men handles the round trip. The fifth man is a fireman. Westbound trains (i.e., from Cherokee to Sioux Falls) are scheduled to depart Cherokee shortly before midnight, Sunday through Friday, and generally arrive in Sioux Falls 3 hours and 30 minutes after actual departure. During daylight hours, switching service is per-

formed at Sioux Falls. The returning eastbound trains operate Monday through Saturday. They are scheduled to depart Sioux Falls around 4:30 P.M. and to arrive at Cherokee at 8:00 P.M. At Cherokee, eastbound freight is transferred to continuing eastbound trains moving ultimately to Chicago. The through trains to Chicago originates at Council Bluffs, IA.

Maximum authorized train speeds are 40 miles an hour between Milepost 0 and 37 and between Milepost 68 and Sioux Falls, and 30 miles an hour between Mileposts 37 and 68. In addition, three long steel bridges require a maximum train speed of 10 miles per hour at the following locations: at Milepost 21.1, just north of Cherokee; at Milepost 62.7, south of Rock Rapids, IA; and at Milepost 89.1, south and east of Sioux Falls, SD. The reduced speed of 30 miles per hour between Mileposts 37 and 68 is because of a lighter weight of rail in that area. The reduced speed of 10 miles per hour over the bridges permits a greater weight to pass over them than would higher speeds.

The current weight limit on the line is a gross weight of 177,000 pounds per car. It was imposed in March, 1976. The timetable shows the earlier, gross-weight limit of 210,000 pounds. A gross weight of 210,000 pounds implies a net-lading weight of 150,000 pounds per car or 75 tons, since most empty cars weigh 30 tons. These weight limits are in contrast to other lines of railroad so constructed as to handle cars with 100 tons lading weight. Prior to March, 1976, heavier cars were handled on the line only with empty or "idler" cars on each end of the heavy cars.

The current maximum train speeds of 30 and 40 miles per hour are considered by ICG to be essential for efficient operation of the line. These speeds permit the movement of a train from Cherokee to Sioux Falls, switching work at Sioux Falls, and the return of the train to Cherokee within 24 hours. The present trip between Cherokee and Sioux Falls is currently made in about 3½ hours. A reduction in the maximum speed to 25 miles per hour would

probably result in a one-way trip of 4 hours and 15 minutes. Such a reduction would "perhaps" result in additional time on duty for the employee; and this could "possibly" result in overtime payments to the crews to Sioux Falls. See page 22 of the transcript. A reduction in the maximum speed to 10 miles per hour would probably require a running time of 8½ to 9 hours, exclusive of time for stops and meals; and any amount of switching to be done in Sioux Falls would leave ICG hard pressed to accomplish that and finish within the 12-hour work period prescribed under Federal law. An additional switch engine, or an additional crew might be needed to perform the work; and ICG would quite possibly consider a tri-weekly service, rather than the 6-day schedule now being performed.

IV. Rehabilitation of the Line

Following the hearing in Cherokee in May, 1978, the United States Court of Appeals for the Seventh Circuit upheld the Commission's regulations found in 49 CFR 1121.42(b) dealing with track rehabilitation. See *Chicago and North Western Transportation Co., et al.* v. *United States*, Docket Nos. 76-2283, 77-1008, and 77-1487, modification on petition for rehearing dated July 31, 1978. Under the regulation, costs of track rehabilitation to a standard of FRA Class I safety standard (10 miles per hour) are permitted to be included if the track is below that standard, or rehabilitation costs to a higher standard are permitted if a potential subsidizer requests a level of service requiring a higher standard. No such request is of record in this proceeding. Since the track of the Sioux Falls District is at a FRA Class III level (40 miles an hour), no track rehabilitation costs should be considered for the present service, as ICG concedes at page 11 of its supplemental brief.

Rehabilitation of bridges is another matter, as bridges are not related to track safety standards. ICG presented evidence, through testimony of a drainage engineer in its bridge depart-

ment, that two bridges needed replacement, due to age and condition, at an estimated cost of $121,540. The estimate was based on system-wide average costs of $515 per foot. This engineer had travelled the Sioux Falls District and examined these bridges, which are at Mileposts 14.3 and 15.6. These bridges were built in 1922 and 1923. He testified that both should be scheduled for renewal in 1979. There are no speed restrictions on these bridges and they can be and are traversed at 40 miles an hour—a point argued by UTU as indicating that renewal is not necessary. ICG's engineer explained that the bridges at Mileposts 14.3 and 15.6, are timber bridges which "bounce back" from sudden overstresses (Tr. 133), unlike steel bridges, upon which speed restrictions to 10 miles per hour are imposed. Therefore, the lack of speed restrictions on the bridges at Mileposts 14.3 and 15.6 is not significant. There is substantial evidence supporting the need for both bridge replacements. Although the cost is only estimated, it was agreed to by the bridge engineering department of IDOT. Accordingly, it is accepted as being reasonably accurate.

V. Revenues and Avoidable Costs Upon Abandonment

Exhibits 2, 7, 8 and 9 provide revenues and variable-cost data for the line. Appendix A to Exhibit 7 reflects much of the same information as contained in corresponding Exhibits 4(1), 5, 6, 7, 8, 17 and 18 attached to the application, with certain corrections. The application exhibits contain data as recent as June 30, 1977, while Exhibit 7 contains data as recent as September 30, 1977.

The cost format used by ICG follows the format prescribed by the Commission in Ex Parte 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service*, 354 I.C.C. 252, 279 (1976). See 49 CFR 1121.40-46 (1977). By this procedure, the Commission considers the actual on-branch costs, and the Carrier's Rail Form A off-branch costs, to determine the total costs of handling traffic moving to and from points on a given branch, or moving via junctions on the branch. The Commission

has discarded the "50 percent" formula, i.e., that 50 percent of an allocation of off-branch revenue would be a reasonable estimate of the cost of handling such business off of the branch. This portion of the Commission's regulations, in Ex Parte 274 (Sub-No. 2), was recently affirmed by the United States Court of Appeals for the Seventh Circuit, in *Chicago and North Western Transportation Company, et al.* v. *United States, et al.*, Nos. 76-2283, 77-1008, and 77-1487 (May 30, 1978).

Revenues, variable costs, and losses (contributions) from operations were shown by ICG to be as follows:

	1975	1976	1977-9 months
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs.....	2,029,355	1,787,916	1,415,324
Loss	(124,229)	53,041	116,740

Fiscal year data was as follows:

	FY-76	FY-77 (actual)	FY-77 (without fresh-meat traffic)
Revenues	$1,864,055	$1,721,304	$ 743,518
Expenses.....	1,839,459	1,854,426	1,237,190*
Loss	(24,596)	133,122	493,672

*No allowance is made for expenses on fresh-meat traffic, such as its high-claim rate.

For an earlier period (July 1, 1974 to June 30, 1975) ICG showed a profit from the line of $327,421 (page 6 of Appendix A to Exhibit 7)—a figure which is understated because it includes wages of trainmen and enginemen as avoidable costs.

According to UTU, the wages of train enginemen and trainmen are not avoidable upon abandonment because of a local agreement which requires the railroad to assign two crews regularly to operate not less than six days a week between Cherokee and Sioux Falls and, if the line is not operated, to pay them the mileage of their assignment. See transcript pages 461-462. According to UTU, ICG cannot require these Sioux Falls District crews to

relocate and, if they voluntarily do so, ICG will still have to assign two crews to the Sioux Falls District and pay them. ICG here refutes this interpretation to the agreement (transcript pages 472-473); but it seems to have acknowledged it, in other proceedings.[1] Also, seniority rules protect the jobs of the enginemen and firemen, who would be shifted to other lines, to fill vacant firemen slots on other lines. ICG did not establish by reliable, probative, and substantial evidence that the wages of these employees would be saved. Therefore, costs assigned to their labor must be deducted, along with the wage additions for fringe benefits and payroll taxes.[2] This reduction results in a showing that the Sioux Falls District has made a contribution to the ICG over recent years. See Exhibit 2 and Appendix A to Exhibit 7. Exhibit 2 shows the following pertinent figures for Account Nos. 392 (Train Enginemen), and 401 (Trainmen), and for Health & Welfare (H&W) and Payroll Taxes (PT) additives:

	1975	1976	1977 (9 months)
Train Enginemen.....	$ 46,678	$ 57,222	$ 45,757
Trainmen	108,914	133,517	106,764
H&W.....	5.75%	6.5%	6.5%
PT	17.16%	17.70%	17.70%

[1]UTU attaches to its brief portions of testimony by an ICG witness, in Docket No. AB-43 (Sub-No. 37), that acknowledges this effect as to a "tab local" agreement, which is the type involved in this proceeding. See page 462 of the transcript.

[2]UTU would also deduct the labor portion of accounts 311 (locomotive repair), 394 (train fuel), 400 (servicing locomotives), and 402 (train supplies and expenses). Under Ex Parte No. 274 (Sub-No. 2) the expenses in these accounts are properly treated by ICG. See 49 CFR § 1142 (1977).

Using these figures to recompute the contribution/loss status of the Sioux Falls District to the ICG, the following contributions are shown:

	1975	1976	1977 (9 months)
Revenues	$2,153,584	$1,734,875	$1,298,584
Costs, as per ICG	2,029,355	1,787,916	1,415,324
Wages to be deducted	155,592	190,739	152,521
Plus H&W deductions	8,946	12,398	9,913
Plus PT deductions	26,699	33,760	26,996
Total deductions	191,237	236,897	189,430
Recomputed costs	1,838,118	1,551,019	1,225,894
Contribution	315,466	183,856	72,690

Another avoidable cost claimed by ICG is for property taxes. Such avoidance depends upon sale of the property for which no firm offers are on hand. If these figures are deducted, the contributions made by the Sioux Falls District are even more significant, as follows:

	1975	1976	1977 (9 months)
Property taxes	$ 71,725	$ 60,678	$ 45,509
Recomputed contribution	387,191	244,534	118,199

ICG claims an increase in avoidable costs will occur as to maintenance-of-way expenses, in order to continue operating at Class III speeds (up to $3,930 per mile compared to $130,005 for the 12 months ending June 30, 1977). This estimate is based on system-average costs and seems excessive since trains currently can operate over the track at speeds of up to 40 miles an hour, and the track seems to have been maintained in fair shape for the considerably lower figure. No estimate was adduced for operating the trains at the slower speed of a Class I railline. Such costs might be lower than those expended to maintain Class III speeds.

VI. Investment Values for Computing Rate of Return

The investment base to which any rate of return should apply is considered by the Commission to be working capital (operating expenses divided by 365 days, multiplied by 15 days on branch cash avoidable costs less depreciation), plus any income tax benefits resulting from abandonment of the line, plus net liquidation value of property for their highest and best use for non-rail purposes. See 49 CFR 1121.43 (1977). The most recent year for which data is available in the record (July 1, 1976 through June 30, 1977) shows a working capital need of $88,516. See page 8 of Appendix A to Exhibit 7. However, ICG mistakenly included off branch costs in these calculations (Tr. 316). Properly computed, the working capital need is $42,088. No income tax benefits are seen by ICG by virtue of this abandonment.

The estimated value of the land in the line, apart from any salvage of materials, is about $3,635,000. The right of way between the towns contains 1,060 acres; and the estimated value is $1,590,000, apart from an assemblage factor. As a continuous strip of land, the property has value for a utility, or a pipeline, or a highway, or for recreational purposes; but ICG knows of no present potential purchaser of the line who would want the entire line. There is farming in the area adjacent to the line; and ICG believes that the land will ultimately be sold for farming purposes. Some inquiries have been received from individuals and attorneys representing adjacent landowners. With an assemblage factor of 50 percent the value is $2,385,000, based on 17 previous agricultural land sales in the area. The land in the towns contains 154 acres, valued at $1,250,000, based on 38 comparable sales. The title to 90 to 95 percent of the land is regarded by ICG as "reasonably merchantable." See page 224 of the transcript. While ICG is a land-grant railroad, the land in question was acquired from adjoining property owners. Title to 90 to 95 percent of the land is held in fee; and there are no reverters in the balance held. A total land value of $3,635,000 represents the highest and best use of the land for non-rail purposes.

Salvage of track materials was estimated on the basis of the January, 1978, Chicago scrap market. All metal items, except rail of 90 pounds or higher, were estimated at scrap prices, even though the possibility exists that some materials could be reused. This results in the lowest possible net salvage value of $2,522,829. Reusable rail was valued at three quarters of the value of new rail, since it could be reused elsewhere on the ICG system as second-hand rail. No salvage value was assigned to bridges because the value of scrap is usually offset by the cost of removal of bridges, and because prospective land purchasers may desire that the bridges be left in place. A salvage value of $2,522,829 is accepted. The total liquidation value is, therefore, $6,157,829.

VII. State Participation in the Proceeding

The Sioux Falls District traverses three States: Iowa, Minnesota, and South Dakota. The major shipping point on the line is Sioux Falls, a city with a 1970 population of 79,000. The 1970 population of other South Dakota cities on the line totaled somewhat over 100 (Benclare and Rowena). The 1970 population of the 10 Iowa cities to lose service over the line (excluding Cherokee) totaled 10,046. The 2 Minnesota cities on the line (Steen and Hills) together had a 1970 population of 762.

IDOT's Trans Plan 1977 included the Sioux Falls District in the Iowa minimum rail system and identified it as crucial to Iowa's economic and social well-being. A new plan has won preliminary approval, however. At a meeting held six days before this hearing, IDOT decided to support the abandonment, except for the two-mile portion out of Cherokee. This decision, and IDOT's vigorous participation at the hearing in support of abandonment seems to have greatly surprised SDPUC, UTU, and at least one Iowa public witness, Roger Immele. IDOT demonstrated that, pursuant to its rail assistance program, it held three public meetings to solicit shipper response from the 43 shippers on the portion of the line in Iowa. There were no more than ten shippers

at any of the meetings and as few as three at the one held on April 27, 1978. Out of approximately 15 Iowa grain and fertilizer shippers on the line, 12 responded to IDOT shipper surveys sent out in December 1977. The surveys were limited to Iowa shippers and apparently revealed that approximately 311 cars would be shipped in calendar year 1978, compared to about 603 moved in 1975 and 403, in 1976. The shipper surveys were not adduced.

IDOT also established that in May 1976 Iowa shippers over the Sioux Falls District withdrew their offer to participate in Iowa's branchline assistance program, whereby branchlines are rehabilitated and maintained with financial assistance from the State and shippers. The State and shippers are repaid, depending upon use of the line. In essence, Iowa's program is a way of lending the railroads money at a low or nonexistent rate of interest. At least part of the reason the shippers withdrew their support is believed by IDOT to be the fact that the 4-R Act was enacted at about this time and, under it, the Federal Government will assist branchlines.

ICG is a participant in Iowa's program, over other of its lines, 's are other railroads, with unit-train loading facilities for grain located nearby the Sioux Falls District. It is IDOT's position that, except for certain unspecified portions of the year, on the domestic market, the grain shippers on the Sioux Falls District can more economically move their grain by truck to at least 13 of these unit-train loading facilities, located an average distance of 20 miles from any point on the Sioux Falls District. (The Sioux Falls District does not have a heavy enough capacity to support unit trains.) Since Iowa has millions of dollars invested in the railroads with these unit-train loading facilities, UTU believes that IDOT's decision to support this abandonment application is an attempt to protect its investment in these other, competing lines. There is some merit to this view.

The problem in using unit-train facilities, for small grain shippers along the Sioux Falls District, is that the facilities are owned

by their competitors, who are large grain shippers such as Cargill. Small grain dealers are disadvantaged by having to depend upon and pay for the use of competitors' facilities. UTU views IDOT's position as supportive of agribusinesses over small grain shippers. There is also merit to this view.

IDOT also notes that the Iowa segment of the Sioux Falls District comprises 73 percent of the entire line; that Minnesota was completely silent throughout the proceeding; that, at the May hearing, no official from South Dakota testified; that only three public witnesses from South Dakota testified, two of which (Metz Baking Co. and Hubbard Milling Co.) gave duplicative evidence concerning a two-mile segment in Sioux Falls, SD, and the other depends only on rail to ship oats; and that one witness testified that not only was the amount of Iowa traffic insufficient to justify retention of the line but, furthermore, the South Dakota traffic was also insufficient to cause the line to be viable. (This witness was an employee of IDOT who had little experience in railroading.)

IDOT argues that "financial losses to the ICG resulting from retention and necessary rehabilitation of the subject line would be staggering and not warranted in light of the present and future traffic." See page 2 of IDOT's brief. This statement was made on the basis of ICG's rehabilitation costs being $3,853,331. IDOT's views based on the $121,540 rehabilitation cost now conceded by ICG to be applicable, are not known.

The State of South Dakota, complaining that it "is tired of being on the wrong end of the popsicle stick," continues to vigorously oppose the abandonment of this line. See page 17 of its brief. South Dakota generates over 80 percent of the carloads handled over the Sioux Falls District. However, its State rail plan assigns this line a low-priority status in comparison to the Chicago Northwestern line (CNW) line (which serves Sioux Falls going east to Luverne and hence to Chicago) which is rated

as a high-priority line. The difference may be attributable to the fact that the Sioux Falls District line is the only ICG line in South Dakota, whereas the CNW is one of South Dakota's principal grain carriers.

VIII. Alternate Transportation Services in the Area Served by the Sioux Falls District

The area served by the Sioux Falls District has alternate railroad and highway service available. Four points on the line will continue to have rail trackage:

Cherokee, IA	- ICG
Sheldon, IA	- CNW
	- Chicago, Milw. St. P.& P. (Milwaukee Road)
Hills, MN	- Burlington Northern (BN)
Sioux Falls, SD	- CNW
	- Milwaukee Road
	- BN

Proximity of the rest of the points on the line to nearby stations of other railroads are as follows, based on highway distances to the nearest rail stations:

Larabee, IA	8 miles (ICG)
Calumet, IA	9 miles (CNW)
Gaza, IA	13 miles (CNW)
Primghar, IA	8 miles (Milwaukee Road)
Archer, IA	10 miles (" ")
Sheldon, IA	0 miles (CNW, Milwaukee Road)
Matlock, IA	7 miles (Milwaukee Road)
George, IA	11 miles (Milwaukee Road)
Edna, IA	18 miles (BN)
Rock Rapids, IA	7 miles (")
Steen, MN	8 miles (")
Hills, MN	0 miles (")
Ben Clare, SD	12 miles from Sioux Falls
Rowena, SD	8 miles from " "
Sioux Falls, SD	0 miles (CNW, BN, Milwaukee Road)

As to South Dakota points served by other railroads, the following facts are relevant. The routes of the BN, CNW, and Milwaukee Road between Sioux Falls and Chicago are more circuitous than those of the ICG. ICG provides overnight service between these points, whereas the CNW takes three to four days; BN takes three days; and Milwaukee Road takes four to seven days. The Milwaukee Road is in bankruptcy and may be liquidated. The financial condition of CNW is marginal. The ability of the Milwaukee Road, CNW and BN to provide facilities for handling piggyback cars at Sioux Falls is not clear. The facilities used may belong to ICG; or they may be located elsewhere and reached by truck. Since most of the cars handled on the Sioux Falls District are piggyback ones, the availability of ramping facilities is important. Even ICG's commerce manager has heard that service by other railroads to Chicago from Sioux Falls is "non-existent" although he, himself, is "not sure." Tr. 216.

Nearby lines—ICG main line through Cherokee, the Milwaukee Road line through Sheldon, the CNW, and the Rock Island Line—are capable of loading and moving large grain trains. The Commission's order in ICC Docket No. 35951 required ICG to join the CNW and Milwaukee Road in the publication of joint rates on multi-car shipments of corn and soybeans (minimum weight 183,000 pounds per car) from origins in Iowa, Minnesota, Missouri, Nebraska and South Dakota to Destrehan and Reserve, LA. In compliance with the order, the carriers published the rates to Destrehan, Reserve, and all other ICG-served ports. Single-car joint rates from the same origins were also published from the same origins to the ICG-served ports. In 1977, some 474 carloads of corn and soybeans moved from Hartley, Paullina, Sioux Rapids, and Spencer, IA (all points in close proximity to the ICG Sioux Falls District) to the Gulf ports, via ICG and the other railroads on the joint tariff rates. Additionally there are unit grain train loading points on the ICG main line very near Cherokee, at Alta and Aurelia.

The rail system diagram maps submitted by the various railroads, reveal that there are other lines in the vicinity of the subject line which are potentially subject to abandonment. Section 802 of the 4-R Act required rail carriers subject to the Act to submit to the Commission a full and complete diagram of the carrier's transportation system. The carrier was required to indicate on the diagram lines which are "potentially subject to abandonment". These lines have been subdivided into four categories: Category 1 includes those lines for which an abandonment application is anticipated within 3 years; Category 2 includes those lines under study for future abandonment; Category 3 encompasses those lines for which an abandonment application is presently pending; and Category 4 includes those lines which have been previously authorized for abandonment and are now being operated under subsidy. As related to this proceeding, the CNW line from Alton to Marathon is in Category 1; and a portion of the Rock Island line southeast of Hartley, to Royal, is in Category 3. In addition to the ICG line into Sioux Falls, the CNW and the Milwaukee Road have lines into Sioux Falls which are Category 2; and BN has a Category 1 line through the city. However, Sioux Falls will continue to have 3 lines into the city which are Category 5 lines (not subject to abandonment), all of which go East to Chicago, as above discussed.

While there is trucking of agriculture-related commodities in the area, these are not the primary commodities moved over ICG's Sioux Falls District. ICG's manager of commerce characterized the present traffic forwarded and received on the Sioux Falls District as "scrap iron", "fertilizer chemicals," "merchandise," and "a little bit of lumber." See page 149 of the transcript. He had no information on the amount of motor-carrier equipment, or the authorities of motor carriers to transport these commodities to and from the points along the Sioux Falls District. According to Exhibit 13 and page 2 of Exhibit 10 to the application, U.S. Highways are available from Cherokee to Primghar and

serve Sheldon, Rock Rapids, and Larrabee. The Rand McNally Road Atlas indicates U.S. Highways also serve the Sioux Falls area. State and county paved roads serve the other points on the line.

IX. Shippers and Receivers Served on the South Dakota Portion of the Line

A preponderance of traffic handled in the Sioux Falls District comes on or off the line at Sioux Falls. Out of 24 principal shippers on the line, 8 are in Sioux Falls; and there are at least 18 other shippers at Sioux Falls which are served by this ICG line. See pages 517-519 of the transcript. However, the only Sioux Falls shipper or receiver of freight appearing at the hearing was Metz Baking Company (Metz); and its interest involves a switching service performed by ICG. The failure of more witnesses from Sioux City to appear may be because SDPUC did not receive actual notice of the date and place for the hearing until the Friday preceding the Monday hearing date and because the place of hearing was some 100 miles away.

Metz is the largest commercial bakery in South Dakota, with yearly sales of over 12 million dollars in 1977. Metz receives bulk flour from Hubbard Milling Company, of Rapid City, SD, via Milwaukee Road with delivery within Sioux Falls by ICG over two miles of ICG track which runs right by the Metz plant. The Metz plant is located south of Sioux Falls at Milepost 94.2 between Sioux Falls and Cherokee. ICG has a spur track connecting to the ICG main line between Sioux Falls and Cherokee. For the last 12 months of the fiscal year ending April 30, 1978, Metz received 145,333 hundred weight of flour. By rail it moves at 40 cents a hundred weight; by truck, from Rapid City to Sioux Falls it would cost $1.12 per hundred weight. See page 343 of the transcript. Cost by truck to move 145,333 hundred weight would have been $162,772; cost by rail was $58,133—a difference of $104,639. Increase to the consumer, had truck been used rather

than rail, would have been about $153,368 in 1977, based on 1977 sales and the production costs of a 1-pound loaf of bread. Shipping the flour from Hubbard's plant in Mankato, MN would be even more costly. It is not economically feasible to move the flour by truck from railcars at Sioux Falls to Metz's plant. In checking with the trucking companies, none were interested in such short hauls. Metz does not want to get into the business of hauling raw materials; the railcars hold approximately two and a half times what a tank truck would hold; and the Metz plant would have to be converted to receive flour by truck. If abandonment is inevitable, Metz pleads that the two miles of ICG track from the Milwaukee Road yard be turned over to the Milwaukee Road. Hubbard Milling supports Metz's plea because of threatened competition from Nebraska flour mills. The Metz account constitutes 15 percent of Hubbard's Rapid City production; and Hubbard expects to lose the account if this line ceases operation. At present, no trucking company has authority to haul flour from Rapid City to Sioux Falls.

Jones Mill & Elevator, at Rowena, SD, also appeared in protest. It has consistently and economically used small hopper cars, which the Sioux Falls District can handle with present weight limits. As a small elevator, Jones does not make it a practice to ship by truck to unit-train loading facilities. Jones shipped between 25 and 30 cars of grain in 1977, all south through Cherokee over the ICG. It regards abandonment of this line as "somewhat disastrous" to it, because delivery by truck nets it a "lot less" for grain—29 cents less per bushel for soybean; 23 cents less for corn; and 7½ cents less for oats, as of the market on May 9. See pages 352-353 and 363 of the transcript. Because of droughts in the past two or three years, it has shipped considerably less than in 1973 and 1974. About 40 percent of all grains are shipped out of the area with the rest consumed locally. This year it has experienced a big turnover of grain. Its elevator has a capacity of 85,000 bushels. The turnover could be five to ten times higher this

year than it was for the last two or three years. In 1977 and 1976 it shipped about 25 to 30 cars on the ICG. It challenged ICG's figures, on pages 28 and 29 of Exhibit 8 which showed only 15 boxcars shipped from Rowena in 1976. ICG's own exhibits are conflicting on Rowena traffic. Page 3 of Exhibit 9 to the application shows 17 Rowena "loads" in 1976 and 22 in 1975. Page 3 of Exhibit 12 to the application shows 25 Rowena "loads" in 1975. The discrepancy is due to the different sources used for the exhibits, Exhibit 12 being more accurate. As of May 9, Jones had loaded 20 cars which is all the cars it has been able to get; it has had backorders for 2 more cars for about 3 weeks; and it needs an additional 6 because of an order received that day. Jones only ships by truck when forced to do so by lack of rail service.

Two other receivers of freight have facilities in or adjacent to ICG's yard at Sioux Falls. They are Zip Feed and Cenex. Also, ICG serves the Morrell plant at Sioux Falls, jointly with other railroads. Other large companies use ICG at Sioux Falls. United Parcel trailers, on flatcars, are carried by ICG to Sioux Falls from Chicago, in piggyback service, for deramping at the Sioux Falls facility. The empty trailers are carried by ICG back to Chicago. ICG also serves Montgomery Ward and South Dakota Distributing Company, in piggyback service, to Sioux Falls. These companies are not protestants in this proceeding.

ICG stands willing to sell any or all of its tracks and property in Sioux Falls for continued rail operation to whoever desires to purchase them "at fair value (i.e. fair value of land plus net salvage value of track, if any)."

See page 22 of ICG's brief. Indeed, ICG will be required to offer its tracks and property for sale by reason of Section 1a(6) of the Interstate Commerce Act,[3] following an authorized abandonment. Also, ICG is willing "to enter into a lease of short duration,

[3] 49 U.S.C. 10905.

following abandonment, to permit continued railroad operation over its tracks pending the completion of a sale of the property." Page 22 of ICG's brief.

X. Iowa Public Witnesses Opposing Abandonment

Roger Immele, Cherokee, IA, testified as a life-long citizen of the area of northwest Iowa. He regards the ICG as this area's "last line and the best line," with the closest link to the East, to Chicago, and to the Gulf. See pages 243-244 of the transcript. It is his understanding that the other railroads serving the area, such as the CNW, the Rock Island, the Milwaukee Road are either in bankruptcy or have filed applications for abandonment of lines in the area and that there is no other line running to the Southeast, East, or South. He was so sure that IDOT was going to protest this application that he threw away the questionaire IDOT sent to him last Fall.

The City Administrator of Cherokee, testifying on behalf of the City Council, stated the basis for the city's opposition to the proposed abandonment. Noted was the absence of a freeway system, a port, and a navigable river to serve the area. Stressed was the increased importance of energy conservation, making vital the retention of transportation services that will move the largest volume of goods, at the least possible cost and expenditure of fuel. Labeled "unwise" was the giving up of a resource such as a railline at this point in the history of our country. See page 250 of the transcript. A warning was expressed that duplication of this service at a future date would be economically very unlikely. Note was made that a viable rail transportation system is an important ingredient in the employment potential of an area.

The Iowa portion of the Sioux Falls District traverses farmland; and a number of Iowa public witnesses testified to a continuing need to receive fertilizer over it. Trucking can add an average of $7 to the per-ton cost of shipping fertilizer, including the shrink-

age factor whenever fertilizer is unloaded. This cost might be compensated for by trucking from railpoints which can handle 100-ton railcars and enjoy lower rates. But at least one shipper, Land O'Lakes, has found there to be a "serious shortage" of trucks in the area to haul fertilizer. Transcript page 443. The possibility of a large unloading facility being built at Cherokee, whereby fertilizer could be offloaded onto trucks from 100-ton railcars, is just a rumor.

One Iowa fertilizer dealer who testified was Farmer's Co-op, located on the line at Larrabee and having 268 members. At a cost of $110,000, the Co-op has just completed a new, 1200-ton fertilizer storage building which is equivalent to about 24, 50-ton cars. It will be filled early in the Fall and again late in the Summer. It regards abandonment of the Sioux Falls District as a "disaster," as it would cost considerably more to move the fertilizer by truck. Transcript page 378. It anticipates a 50-car inbound requirement, per year, for this new facility. In 1976 and 1977, maybe two or three percent of the Co-op's fertilizer came in by a truck-river barge movement from Sioux City. The rest came by rail. The Co-op also would use small hopper cars for outbound shipments of grain if ICG would equalize the freight rates so that it could pay freight on the actual amount of bushels loaded. As rates are now, the Co-op follows a common practice of moving its grain by truck to unit-train loading facilities, 10 to 20 miles away because rates are lower on unit-train shipments. Use of unit-train facilities requires the Co-op to use the elevator facilities of competitors such as the Cargill, a large grain company. The Co-op would prefer to ship hopper cars out of Larrabee direct to the Gulf and would use maybe 30 to 50 of ICG's small hopper cars, a year, for these movements, if rates were adjusted. The Co-op ships corn, oats, and soybeans. It handles about 100,000 bushels of beans a year. Corn is primarily used for local feeding of cattle. It has been three years since the Co-op loaded grain on the ICG at Larrabee.

Archer Cooperative Grain Company is located on the ICG line, at Archer, and has approximately 321 members. The Archer area did not suffer drought conditions in 1975, 1976, or 1977. Fertilizer received by rail amounted to 2,310 tons in 1975; 2,519 in 1976; 2,176 in 1977; and 2,600 projected for 1978. Trucking in the fertilizer would cost $5 to $7 a ton more and take the profit out of such sales. Last year some fertilizer moved into Archer via a truck after a prior movement by river. Rail service is preferred. If the ICG's Sioux Falls District is abandoned, the Co-op hopes to make an arrangement to lease some property on a nearby railroad, have it shipped there in 100-ton cars, and the trucked to its facility. Nearby railroads are the Milwaukee Road and CNW. In 1974, this Co-op brought in 45 railcars of fertilizer and shipped out 134 railcars filled with grain. (The years 1973 and 1974 were when the Russian grain deal took place.) It has used trucks rather than railcars for grain shipments since 1975, after the ICG put the 177,000-pound, weight limitation on the Sioux Falls District. It ships corn and soybeans, primarily corn. About 35 to 40 percent of the corn is used locally, in the form of feed. The corn trucked out moves to the elevator of Cook Industries at Hartley. Cook is a very large, nationwide, grain-marketing company which is about to be taken over by Mitsui, a Japanese company.

Burt's Farm Service, at Calumet, is a fertilizer and chemical supplier located on the ICG Sioux Falls District line. No other railroad serves it. Nearby lines of the CNW are in poor condition. All of its fertilizer, except andydrous ammonia, comes in by rail. As of May 9, it had received 36 railcars of fertilizer in 1978. It usually receives 4,000 tons of fertilizer by rail; but this year it will probably receive substantially more.

Land O'Lakes is a farmer's regional cooperative; and its basic interest is the distribution of fertilizer. To members located along the Sioux Falls District line it shipped 49 railcars of dry fertilizer in 1975; 56 in 1976; 78 in 1977; and 94 projected for 1978. It ships fertilizer from Fort Dodge, IA, to Larrabee, Sheldon, and Rock

Rapids. On an emergency basis, Land O'Lakes ships about five percent of its fertilizer shipments to Sheldon by truck. Land O'Lakes also has a soybean-oil processing plant at Sheldon which uses ICG's Sioux Falls District line to ship to Decatur, IL. The extent of this use is limited by weight restrictions on the line. In any event, most of the soybean oil is shipped to the West Coast.

Ray Alder has an agricultural, lime-spreading business. He receives between 30 and 50 carloads of lime at Calumet from Fort Dodge, IA, over the Sioux Falls District line of ICG. Calumet is his central distribution point. Primarily he receives in the Fall. The lime is unloaded onto trucks and taken by them to the fields for spreading. Abandonment of the line would be inconvenient and might add an expense of between $6,000 and $7,000 due to a need to relocate.

Calumet Feed Service, of Calumet, sells feed. It handles soybeans, corn, and oats. It has used ICG, in the past, but has not done so for two years. It would like to use ICG's Sioux Falls District line to reach the soybean market in the Gulf; but it can only do so, profitably, if the line is upgraded to handle heavier cars. It ships out about 120,000 bushels of beans and maybe 50,000 bushels of corn, a year.

Rock Rapids Community Affairs Corporation has invested in an industrial site in the southeast quadrant of Rock Rapids. The Corporation paid for a rail spur. Abandonment would limit the attraction of industry. The community recently lost the services of the Rock Island Line, by abandonment. The industrial site has water and electricity. At present, there are no industries or firms interested in locating at the site.

A farm equipment dealer, at Rock Rapids, uses ICG for inbound farm machinery, which is handled on flatcars. It receives from 8 to 12 tons a year over the ICG. The machinery is picked up

by its truck, at the track, or driven away. At least half of its machinery comes in on trucks. A railcar can handle about double the pieces of machinery that can be loaded onto a truck.

Hy-Vee Food Stores, Cherokee, withdrew its opposition pursuant to an agreement reached where by ICG is to assure continued service along a two-mile segment of line north of Cherokee, from Milepost 0.0 to 2.0. The agreement is for ICG to lease that portion of the line to the Cherokee Industrial Corporation as an industrial spur for the purpose of developing an industrial park and service to a Hy-Vee Stores' warehouse.

XI. Interests of Railway Labor

At page 24 of its brief ICG states that, following abandonment, affected employees are entitled to protective measures and those prescribed in *Oregon Short Line R. Co. Abandonment—Goshen*, 354 I.C.C. 584 (19) should be adopted in this proceeding.

XII. Environmental Impact, Including Effects on Energy and Rural and Community Development

The October 26 hearing on the environmental issues was held pursuant to requests of SDPUC and UTU. Prior to the hearing, the parties were allowed to inspect the data supporting the conclusions reached by the SEE.[4] A staff member who participated in the preparation of the survey and addendums was cross-examined by the parties. The parties were allowed to present rebuttal testimony on the environmental issues raised in the TAS. Briefs on the environmental issues were filed, after the October 26 hearing, by applicant, SDPUC and UTU. All concerned were allowed to develop, fully, the environmental issues in this proceeding.

[4] "SEE" stands for the Commission's Section of Environment and Energy.

The TAS prepared by the Commission's Section of Energy and Environment (SEE) concludes that this "abandonment proposal would not significantly affect the quality of the human environment [and that] "[p]reparation of a detailed environmental impact statement [EIS], therefore, is not required." Exhibit 15, page 23. At the hearing on the environmental issues it developed that the SEE based the TAS, in large part, upon evidence received from applicant, including advice received after this proceeding was noticed for hearing. Such *ex parte* advice is prescribed by the Commission. See 49 CFR 1100.4(e) and Appendix C thereto. SDPUC, the South Dakota agency charged with responsibility for that State's transportation resources, was not contacted at all by the SEE. Because 62 percent of the total rail trackage in South Dakota is under consideration for abandonment, and because there are ongoing discussions at the Commission of doing a EIS for part of South Dakota, which could include the area served by ICG's Sioux Falls District, SDPUC and UTU argue that an EIS should be prepared for this abandonment proposal.

Applicant supports the conclusions of the TAS, including those that abandonment of this line would have a significant and adverse impact on wildlife habitat in the immediate area, unless the right of way is purchased by someone who will preserve it as a wildlife shelter, and that the abandonment would almost certainly result in an irretrievable loss of a transportation corridor, due to the difficulty of ever reassembling the land, if it is sold off to private persons. These specific conclusions of the TAS are accepted. Several others are not, however.

Not accepted are estimated increases as to fuel usage, air pollution, noise level, and highway wear, should abandonment be effected. The estimates are probably understated to a considerable degree, primarily because they rest on the tenuous assumption that all the traffic at Sheldon and Sioux Falls will continue to move by rail. The bulk of the traffic handled over the Sioux Falls

District originates or terminates at Sioux Falls, so whether Sioux Falls' traffic is diverted to other raillines or to motor carriage is critical to these estimates. The SEE's assumption is based entirely on the existence of trackage at those points and upon timetable speeds. The SEE does not consider the quality of the alternate rail service, its capability of providing an equivalent level of service, or the financial condition of the railroads. Yet the Milwaukee Road, which has trackage at both points, is in bankruptcy and may be liquidated. At Sioux Falls, service by other raillines may be virtually nonexistent, as an ICG official conceded at the hearing. The service offered by other raillines is certainly circuitous or slower between Sioux Falls and the major transportation center of Chicago, as compared to that of ICG's line. Furthermore, much of the traffic at Sioux Falls is piggyback in nature and requires ramping facilities to load and unload. ICG has such facilities at Sioux Falls. However, it is unclear whether the other raillines have any such facilities there, or adequate ones to absorb the additional traffic now being handled by ICG. Piggyback traffic, the type mainly handled over the Sioux Falls District, can easily and quickly move by motor carrier; and when ICG cancelled its fresh-meat tariff in December 1977, that considerable traffic to East Coast markets was, indeed, picked up by motor carriers, not the other raillines serving Sioux Falls. It is safe to assume that any other traffic for which speedy delivery is desirable will also make the shift to motor carriage should ICG be allowed to abandon its line at Sioux Falls.

Also questionable is the SEE conclusion that industrial parks at Sioux Falls and Rock Rapids will not be adversely affected by abandonment of ICG's line. One of the two alternate raillines serving the Sioux Falls park is the financially-troubled Milwaukee Road. The other is the BN, which takes three days to reach Chicago. At Rock Rapids, a 16-acre park presently has only one industry located there and one prospect, neither of which are rail users. ICG is the only railline available to the Rock Rapids park;

and its present underutilization may well be due to the fact that the continued availability of rail service is in doubt.

DISCUSSION AND CONCLUSION

As Division 1 of this Commission has had recent occasion to observe: "In analyzing the substantive aspects of an abandonment, the Commission has the task of weighing the present and future need for the line of railroad (including the effect the abandonment would have on the community served by the line), against the future burden that would be imposed upon the carrier, its system, and interstate commerce, by continued operation." See page 6 of *Illinois Central Gulf Railroad Company Abandonment Between Seely and Mande in Williamson County, IL*, AB-43 (Sub-No. 27), served October 1, 1978, which also lists the factors to be considered, "among others, [as] the revenues that can reasonably be expected to arise from operation of the line, the financial ability of the carrier to continue operation over the line, the current levels of traffic moved over the line, and the traffic potential in the area involved," and also the "availability of alternative means of transportation and cost of maintenance and rehabilitation of the line."

After proper adjustments are made for labor costs, as already discussed above, the revenues generated by the Sioux Falls District have been sufficient to make a contribution to the ICG over the years for which there is data in the record. This has been true in spite of drought years, a labor strike against one of its largest shippers during these years (Iowa Beef Packers) and the use of dilapidated, leased equipment for providing the considerable service to fresh-meat shippers. Normally, if users of a line furnish sufficient traffic to pay operating costs, the operation of the line is not deemed to impose an undue burden upon the carrier or upon interstate commerce. *Chicago, M, St.P and P. R. Co., Abandonment*, 348 I.C.C. 749, 753 (1976).

The fact that traffic has diminished over the line is a direct result of ICG's relinquishing a primary source of revenue—fresh meat in ICG-furnished refrigerated trailers. The cancellation of its fresh-meat tariff in the same month that it filed this abandonment application suggests that ICG was artificially building up a case for itself. There is nothing in the record to suggest that fresh-meat traffic cannot be recaptured, should ICG again obtain some equipment to service fresh-meat shippers.

Some grain traffic has also been lost to lines capable of handling large, unit trains; but grain movements have never been substantial over the Sioux Falls District. There are, however, some small grain shippers over this line who foresee an increase in the need for small grain cars, and some grain shippers who would revert to use of the Sioux Falls District line, if ICG would make it attractive for them, ratewise. Nothing on the record indicates that ICG cannot recapture enough traffic along this line to maintain a profitable operation.

Out of these profits, ICG should be able to pay off the bridge rehabilitation costs within a few years. As the Commission held in ICG's Sub-No. 27 proceeding, ibid, rehabilitation expense is a cost that should be capitalized over a period of years when considering its burden to the carrier. While ICG is not a financially-strong railroad, it should be able to absorb the bridge-rehabilitation costs, to the extent that profits of the Sioux Falls District may fall short of covering them.

The desire of ICG to abandon the Sioux Falls District probably arises, in large part, from the low rate of return being realized on the investment in this line. At a modest rate of return of 9 percent a year, ICG calculates that it should receive $559,072 on its investment base in the Sioux Falls District. See page 8 of Appendix A to Exhibit 7. Excluding off-branch costs from the working capital figure, as discussed above, would lower that figure by several thousand dollars. But even so lowered, the Sioux Falls

District has not generated that high a rate of return during the years for which there is data in the record. Of course, the amount of the investment base itself is highly speculative, as it depends upon land sales for which there are currently no offers, and an assemblage factor even though ICG itself doubts that it will be sold in one piece. Division 1 of the Commission commented, in ICG's Sub-No. 27 abandonment proceeding, ibid, that there is a question as to the proper interpretation to be given "opportunity costs" (rate of return) in abandonment proceeding, and that the matter is one of general transportation importance being examined in *Texas & Pacific Railroad Company—Abandonment Between San Martine and Rockhouse, in Colberson County, Texas*, AB-20 (Sub-No. 3). Under the factual circumstances of the Sub-No. 27 proceeding, Division 1 found no reason to hold that decision in abeyance pending a resolution of the treatment to be accorded rate of return.

Rate of return on the investment base of the Sioux Falls District has been considered in reaching this decision, however. As, the Supreme Court has ruled, in abandonment proceedings an effort must be made to decide "what fairness to all concerned demands." (*Colorado* v. *United States*, 271 U.S. 153, 168 (1926)); and it is fair for a railroad to receive a reasonable rate of return on its investments. Should ICG be allowed to convert its investment in this line to cash, the use of the resulting dollars could go into the upkeep of other lines handling more traffic. However, ICG makes no commitment as to its use of any the funds which might flow from abandonment of its Sioux Falls District. These funds might end up as part of the purchase price of another soft-drink business which ICG's parent plans as one foundation for its long-range structure. (In the year the Sioux Falls District line enjoyed its highest profit, IC Industries did purchase Bubble Up.) While it might well be in the public interest for ICG to divert its investment in the Sioux Falls District into other railines, it would not be in the public interest to sacrifice an irre-

trievable transportation corridor to such businesses as IC Industries currently plans for its structure. Nor it is unfair to ask IC Industries to forego maximizing its rate of return on investments and to continue the operation of a rail property which at least has reasonable prospects of operating at a profit, albeit at a lower rate of return than non-rail properties might generate. After all, IC Industries got its start from the wealth of ICG, which is a land-grant railroad; and through ICG, IC Industries is benefitting from massive infusions of Federal funds to enable its subsidiary to continue to serve the public. These circumstances mitigate any unfairness to the railroad.

Also to be considered is whether it is fair for the communities and rural areas along the Sioux Falls District to lose a railline just because its rate of return on investment value may not be sufficiently high. In this regard, Congress now requires that consideration be given, in abandonment proceedings, to whether abandonment "will have a serious, adverse impact on rural and community development." See 49 USC 10903 (1978) a recent codification of the Interstate Commerce Act and related laws. The loss of ICG's Sioux Falls District line seems more likely than not to have such an effect. This line is a direct railline between the area served and Chicago, East Coast, and the Gulf of Mexico markets. Even if ICG reduces speeds to 10 miles an hour, the directness of its route gives ICG an advantage over alternate rail service at the point generating most of the traffic, Sioux Falls. Alternate rail service at Sioux Falls is circuitous and its quality, to the extent it was proved, is poor. The availability of enough trucks to absorb ICG's traffic is uncertain. Small grain shippers, albeit few in number, will be forced to rely upon grain elevators of their competitors which are large companies and one of which is about to be purchased by a foreign interest. Farmers can expect to pay more for fertilizer as it costs more to move it by truck. Consumers can expect to see a rise in price of products, such as bread, to cover increased transportation costs of trucking. The industrial park at

Rock Rapids will lose all rail service, which will certainly hamper development prospects in that community. The industrial park at Sioux Falls will be left with only the poor services of the bankrupt Milwaukee Road, which faces the prospect of liquidation, and the slow service of the BN. Some businesses along the line will have to relocate. Transportation patterns will be disrupted.

On this record ICC has not met the burden, which Congress placed squarely upon it, of proving by "reliable, probative and substantial" evidence that "the present or future public convenience and necessity require or permit the abandonment. . . ." See 5 USC 556(d)(1976) and 49 USC 10904(b)(1978).

The consequences of denying this application will most likely have some beneficial effects upon environmental and energy concerns. A wildlife habitat will be preserved. And rail traffic will not be diverted to motor carriers, which would probably use more fuel to handle the same amount of traffic, create more noise and air pollution and inflict highway wear. Because of the relatively small amount of traffic and area involved, however, these consequences do not elevate this decision denying the application to a major Federal action involving environmental and energy matters.

Other issues raised by UTU and SDPUC need not be further discussed or resolved, in view of this outcome.

ULTIMATE FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that issuance of a certificate to abandon applicant's Sioux Falls District, from Milepost 0.0 at Cherokee, IA, to Milepost 94.47 at Sioux Falls, SD, is not consistent with the public convenience and necessity. It is further found that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environment Policy Act of 1969, or a major regulatory action under the Energy Policy and Conservation Act of 1975.

The application is denied. This order is effective 20 days from the date of service, in the absence of an appeal or a stay by the Commission.

By the Commission, Isabelle R. Cappello, Administrative Law Judge.

G. HOMME, JR.
Secretary

(SEAL)

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Nos. 80-2122 and 81-350

IN THE

Supreme Court of the United States

October Term, 1981

ILLINOIS CENTRAL GULF RAILROAD COMPANY,
Petitioner

v.

CITY OF CHEROKEE, ET AL.,
Respondents

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

CITY OF CHEROKEE, ET AL.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented by the petitioners are not supported by the decision below or by the record, for the court of appeals did permit the agency to "consider" all costs; properly set aside the agency's balancing of the public interest factors; and did not substitute the Administrative Law Judge's decision for the agency decision.

The questions presented, in the view of respondents, are:

1. Whether the court of appeals properly construed "avoidable costs" in light of the statutory term. 49 U.S.C. 10905(a)(1).
2. Whether the court of appeals properly overruled the I.C.C.'s sole reliance upon profitability of a line in balancing the benefits and burdens of continued rail service.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 641 F.2d 1220. (Pet. App. A, 1a-27a).[2] The decision of the Interstate Commerce Commission is reported at 363 I.C.C. 93 (Pet. App. E, 42a-51a). The decision of the Ad-

[1]The (non-federal) parties to the proceedings below are listed in the caption of the petition in No. 80-2122.

[2]Unless otherwise indicated, references to the opinions below are as paginated in No. 81-350, the petition of the Interstate Commerce Commission for a writ of certiorari.

ministrative Law Judge is unreported. (Pet. App. F, 52a-85a).

JURSIDICTION

The judgment of the court of appeals (Pet., 28a) was entered February 12, 1981. The railroad's petition for rehearing was denied March 17, 1981. (No. 80-2122, App. C). The I.C.C.'s petition for rehearing was denied April 9, 1981. (Pet., 29a). The petitions for a writ of certiorari were filed June 15, 1981 in No. 80-2122, and on August 24, 1981 in No. 81-350, both within the time as extended. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Former provisions of 49 U.S.C. 10903-5 (1976 Ed. Supp. III) are set forth in the petitions. (No., 80-2122, S1-S7; Pet., 86a-90a). Portions of certain I.C.C. regulations also are reproduced. (Pet., 92a-94a).

STATEMENT

This litigation arises from the application, filed in December, 1977, by Illinois Central Gulf Railroad Company (ICG) to abandon its 96-mile line between Cherokee, Iowa and Sioux Falls, South Dakota.[3] If successful, ICG would continue service on a 2-mile portion leading from Cherokee, by reclassifying the track from main to industrial, but ICG would physically abandon the remaining 94 miles. (Pet., 32a n.1, 52a-53a). The ICG application

[3]The line also traverses a short distance in Minnesota, serving two communities. (Pet., 67a).

was filed under former 49 U.S.C. 1a, the provisions of which were codified in 1978 to 49 U.S.C. 10903-5, as pertinent here.[4] However, Staggers Rail Act of 1980 subsequently was signed into law October 14, 1980. P.L. 96-448. The provisions of 49 U.S.C. 10903-5 were substantially amended by Staggers Rail Act of 1980, but not from a substantive standpoint.[5]

ICG's application was heard by Isabelle R. Cappello, Administrative Law Judge (ALJ). The ALJ denied the abandonment for a number of reasons. She found that after proper adjustments are made for labor costs, the revenues generated by the Sioux Falls District line have been sufficient to make a contribution to ICG, although with a low rate of return on investment. In balancing the benefit of the service to the public against the burden upon ICG, she came down on the side of the public and denied the abandonment, noting in particular that ICG made no commitment to use any fund freed up by abandonment for other rail activities.[6] (Pet., 80a-85a).

The wages which ICG had assigned to the line for enginemen and firemen, and for trainmen, were contested by M.S. Stuckey, General Chairman for the United Transportation Union, who appeared at the Cherokee, IA hearing. Mr. Stuckey testified that the railroad would con-

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[4]Congress reenacted the Interstate Commerce Act as Subtitle IV of Title 49, United States Code (P.L. 95-473, 92 Stat. 1337). The recodification did not make any substantive change. 92 Stat. 1455.

[5]P.L. 96-448, section 402. "No changes are made in the standards under which the I.C.C. decides whether or not to grant the abandonment of railroad lines". S. Rept. 96-470, 39 (1979); See also: S. Rept. 96-1430 (Conf. Report), 125 (1980).

[6]ICG is a wholly-owned subsidiary of IC Industries, which specializes in consumer products. (Pet., 53a-54a, 83a-84a).

tinue to pay the crew wages even if the line is abandoned. ICG did not offer any rebuttal to the labor witness, and the labor organization attached to its brief testimony by an ICG witness in another I.C.C. abandonment case that acknowledged that trainmen wages were non-avoidable owing to the same "tabulated local agreement". The ALJ found "ICG did not establish by reliable, probative, and substantial evidence that the wages of these employees would be saved."[7] (Pet., 60a-61a).

The "tabulated local rule" requires the railroad to assign two crews regularly to operate not less than 6 days per week between Cherokee and Sioux Falls and, if the line is not operated, to pay them the mileage of their assignment. (Pet., 60a).

The ALJ's decision was lengthy, and went into great detail concerning the economics of the train service and the needs of the involved shippers and communities. (Pet., 52a-85a).

On appeal, Division 1 of the I.C.C., composed of three commissioners, reversed the ALJ, and ruled that the "tabulated local rule" is a private labor-management agreement that is not within the purview of the I.C.C.'s expertise or responsibility. Division 1 referred to the I.C.C.'s abandonment regulations which recognize crew costs as "avoidable costs". (Pet., 45a-46a). In addition, Division 1 disagreed with the ALJ's finding that real estate taxes likewise were not avoidable, although this point had not been found controlling by the ALJ. (Pet., 46a); and also that the ALJ's traffic prospects were unduly optomistic. In light of these factors, Division 1 believed continued operation of the Sioux Falls District line will impose an undue

[7]The statute specifically places the burden of proof upon an applicant for abandonment. 49 U.S.C. 10904(b) (1976 Ed. Supp. III). (No. 80-2122, S-3).

economic burden upon ICG, which is not offset by the inconvenience and additional expense to shippers and adverse impact on rural and community development. (Pet., 47a).

The entire I.C.C. found the case involved matters of general transportation importance, and gave further consideration. It noted confusion and possible conflict between divisions and among ALJs., concerning "avoidable costs" and the burden of proof. (Pet., 31a). While affirming the decision of Division 1, the I.C.C. stated the crew wages must be considered avoidable upon abandonment for an even more fundamental reason. This reason was that to carry out the purpose of determining the effect on an abandonment upon the economic well-being of a railroad, (Pet., 33a):

> ". . . every ongoing out-of-pocket cost of a particular rail operation, that cannot be properly reallocated to any other revenue – producing operation, must be considered as part of the cost of the operation proposed for abandonment."

The I.C.C. then said "avoidable cost" is necessary because of joint costs – that is, costs which support two or more revenue-producing operations. Since the train crews only operate over the Cherokee-Sioux Falls line, their wages are not joint costs and cannot be reallocated to any traffic other than that transported over the line. Accordingly, the I.C.C. ruled that the crew wages are "avoidable" even though they would not be saved. However, if it turned out that ICG is required to continue paying these crews, then the wages would be treated as a *deferred* cost of the abandoned operation. The I.C.G. added that "no one contends that they will continue indefinitely to be paid for doing nothing." (Pet., 33a-35a).

Finally, the I.C.C. said that there is a close analogy between "this local labor agreement" and the labor protective conditions that the I.C.C. uniformly imposes in rail merger and abandonment cases, and that it would be improper to use the prospective imposition of labor protective provisions as an argument for ignoring present labor costs. (Pet., 35a-36a).

The I.C.C. concluded that the "tabulated local agreement" is "simply irrelevant". (Pet., 40a).

The court of appeals reversed the I.C.C., and remanded the cause for reconsideration. The two dispositive questions were whether the I.C.C. correctly included train and engine crew wages as "avoidable costs", and whether the I.C.C. properly balanced the interests of the carrier and the affected communities before authorizing abandonment.

The court observed that the collective bargaining representative testified without equivocation that the wages must be paid under existing agreement even if the trains are not operated, and the only indication to the contrary in this record is an unsworn and unsupported denial by the carrier's attorney. (Pet., 14a n. 7).

The court said that the I.C.C. tied "unavoidable" costs to "joint costs", and concluded that there were no joint costs in this case, all costs being avoidable upon abandonment. This was error, and the I.C.C. should have used the term "avoidable cost" as defined by Congress as a guide. 49 U.S.C. 10905(a)(1) (1976 Ed. Supp. III) – "all expenses that would be incurred by a rail carrier that would not be incurred if the railroad line over which the transportation was provided were abandoned . . . (Pet., 14a-16a).

On the second issue, the court said the I.C.C. in substance had ruled that abandonment is permissible if the

railroad could not operate the line as a profitable concern, and if it could earn greater profit by abandonment and sale. This was held eror, as the test for abandonment is not solely whether the carrier's investment can be more profitable but to work elsewhere, but involves a balancing of interests. (Pet., 16a-17a).

Judge Adams dissented. He faulted some of the language in the majority opinion which contained a typographical error. In response to the objectors' contention that the wages must be *solely* incurred for continued service to be "avoidable", he said the issue was whether the I.C.C.'s decision had a rational basis. He found the I.C.C.'s concept of a "deferred wage cost" not to be arbitrary, and neither a valid basis for denying abandonment nor a ground for defining an unprofitable operation as profitable. (Pet., 20a-23a). He equated the treatment of wage costs with real estate taxes, claiming the latter also avoidable within a reasonable time after abandonment. (Pet., 23a-24a). Finally, the dissent faulted the majority for passing upon an issue not briefed, i.e,, the balancing of the benefits and burdens of the abandonment. (Pet. 24a-26a).

ARGUMENT

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of national importance. The "tabulated local rule" is unique to certain specified lines of the former Illinois Central Railroad Company, and has no counterpart on other railroads. National Railroad Adjustment Board-First Division, Award 17194 (Docket No. 27306) (October 26, 1955):

> "The Illinois Central is unique among railroads in its contract provisions for payment of the local

> freight rate. Instead of having, like other railroads, a rule that provides for payment of the local freight rate for performance of a specified amount of picking up, setting out, and station switching, the Illinois Central and its conductors and trainmen have a rule providing for application of the local freight rate to certain numbers of assigned crews on specified operating districts and, in addition, several supplementary local agreements calling for payment of the local freight rate to crews as specified therein. The effect of the Illinois Central contract provisions is that the local rate follows the assignment of crews to which it is negotiated rather than, as on other railroads, a certain type of work.

The "tabulated local rule" is not a labor protective condition instituted to ease transition to abandonment,[8] nor is it a "deferred" cost of abandonment. Rather, the rule is an integral part of working conditions on certain portions of the present ICG. To be sure, ICG periodically seeks changes in the rule, and has a notice pending under section 6 of the Railway Labor Act, presently in mediation.[9] But it is presumptious of the I.C.C., to assert "no one contends that they will continue indefinitely to paid for doing nothing". (Pet., 35as n.5; Pet., 5; Pet., 22a). For the structure of the Railway Labor Act is that the status quo shall

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[8]Employee protection for abandonments stems from Congressional legislation, as implemented by the I.C.C. See: *Oregon Short Line R. Co. Abandonment-Goshen,* 354 I.C.C. 76 (1977), 354 I.C.C. 584 (1978), 360 I.C.C. 91 (1979), 360 I.C.C. 666 (1980).

[9]Mediation Case No. A-10454.

be maintained unless altered according to its provisions[10] Cf. *Elgin, J. & E R. Co.* v. *Burley,* 325 U.S. 711, 722-28 (1945); *Trainmen* v. *Chicago, R. & I. R. Co.,* 353 U.S. 30 (1957).

The I.C.C.'s assertion that the avoidability or non-avoidability of labor costs presents an "important and recurring" question warranting review is without any foundation. There is absolutely no support for the I.C.C.'s view that "most" collective bargaining agreements "typically" contain provisions for "employee protection" like those in this case which may prevent a railroad from immediately eliminating all of these costs upon abandonment. (Pet., 8-9). The I.C.C. cites no examples, and there are none with perhaps the exception of enginemen (firemen) wages which the I.C.C. itself considers non-avoidable in many instances. *Baltimore and Ohio R. Co. Abandonment,* 354 I.C.C. 798, 853 (1978), remanded sub nom. *Illinois* v. *I.C.C.* (No. 78-1762), 7th Cir., 1/20/81).[11]

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[10]ICG's position before the I.C.C. was that the tabulated local rule would not apply where an "entire" district is to be abandoned, but here 2 miles would remain. (Pet. 32a n. 1). The court of appeals noted that ICG offered no testimony, only the view of its counsel. (Pet., 14a n. 7).

[11]For a general background to the enginemen/firemen situation, see: *Brotherhood of Railroad Trainmen* v. *Akron & B.R.R. Co.,* 385 F.2d 581 (D.C. Cir. 1967), cert. den. 390 U.S. 923; *Brotherhood of Loc. Fire. & Eng.* v. *Atchison, T. & S.F. Ry. Co.,* 442 F.2d 794 (D.C. Cir. 1971).

Moreover, amendments to the abandonment provisions resulting from Staggers Act of 1980 — now insure that there will be rapid and continual review of abandonment applications. The I.C.C. must make an initial determination within 165 days after an application is filed, which is comparable to the approximately 150 days for passenger train discontinuances. 49 U.S.C. 10904(c)(3); 49 U.S.C. 10908; P.L. 96-448, Section 402).

The I.C.C. during the 25-months period August 1, 1979 through August 31, 1981, has approved every abandonment application, and has reversed every ALJ that dared deny an application. This has embraced 330 cases involving 8,726 miles of line. This is a record of unblemished support for the railroad industry, and is inconsistent with prior practice, when abandonments on occasion were denied. Cherington, Charles, *The Regulation of Railroad Abandonments,* 100-101 (Harvard, 1948); Conant, Michael, *Railroad Mergers and Abandonments,* 114 (Univ. of Calif., 1964). An occasional court remand should come as no surprise in view of the I.C.C.'s current handling of abandonment matters.

1. *"Avoidable costs" and "Joint costs".* The court of appeals did not err in requiring the I.C.C. to employ "avoidable costs" as defined by the Congress, rather than to equate joint costs with non-avoidable costs[12] The

[12]I.C.C. and ICG both highlight the dissenting expression in its quibbling over typographical error by which the majority termed the agency had redefined "avoidable cost" as synonymous with "joint cost". (Pet., 8, 12-13, 20a; No. 80-2122, 11). The majority opinion correctly quoted the I.C.C.'s "joint cost" theory as unavoidable costs at four places in the text (Pet., 2a, 10a, 15a), but had two typographical errors elsewhere. (Pet. 10a, 15a).

I.C.C. until this abandonment proceeding had used the same statutory concept of "avoidable cost" for abandonments as for subsidy under 49 U.S.C. 10905, which was developed in rulemaking. *Abandonment of R. Lines & Discontinuance of Serv.*, 354 I.C.C. 214, 218, 228 (1977). The costing standards for subsidy purposes and abandonment purposes should be the same. *Chicago & North Western Transp. Co.* v. *U.S.*, 582 F.2d 1043, 1060-61 (7th Cir. 1978), cert. den. 439 U.S. 1039. Moreover, in its abandonment regulations, the I.C.C. has indicated that when "actual costs are specified as the basis for assigning an expense, it shall mean that the only costs which can be assigned to the account are those costs which are incurred *solely* as a result of the continuation of rail freight service on the branch. (Pet., 91a-92a).[13]

The Seventh Circuit recently commented upon the I.C.C.'s decision in this case. Nos. 80-2096 & 80-2097, *International Minerals & Chemical Corp.* v. *I.C.C.*, The Seventh Circuit said that language in the I.C.C.'s opinion suggested that the only unavoidable costs were those which are joint; however, the Seventh Circuit panel noted that "while a true joint cost may almost always be unavoidable, not all unavoidable costs are joint ones." (Nos. 80-2096 and 80-2097, Slip op., pp. 6-8, 8/3/81).

Here, the I.C.C. departed from the statutory provision, and from its own regulations. It was error for the I.C.C. to equate an "unavoidable cost" with a "joint cost". A cost may be unavoidable, yet not be a joint cost.

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[13]The I.C.C.'s reproduction of its accounting regulations for engine crews-Salaries and wages, and Train crews-Salaries and wages, employs "Do" as the basis. (Pet., 91a-92a). The "Do" refers to "Actual" in an earlier column not reproduced 49 CFR 1121.42.

2. *Analogy with property taxes.* One of the features of the dissenting opinion is claimed analogy between property taxes and labor expenses. (Pet., 23a-24a) The court of appeals agreed with the I.C.C. that property taxes were shown avoidable. (Pet., 12a n.5). But real estate taxes were found avoidable because of a reasonable certainty they would be avoided following abandonment. (Pet., 37a). Certain labor costs, in this proceeding, cannot be found avoidable with such certainty, and would be contrary to existing labor agreements which can be changed only in the prescribed manner.

3. *ALJ versus I.C.C.* Another feature of the dissenting opinion was the claim that the court of appeals should not have altered its level of review because the I.C.C. differed from its ALJ, and that the ALJ's conclusion is to be accorded little deference except on matters of credibility. (Pet., 19a). In this Court, ICG bases virtually its entire petition for a writ of certiorari on the assertion the court of appeals substituted the ALJ's decision for that of the agency itself.[14] (No. 80-2122, ii).

But the fact that the court of appeals said that the ALJ was right and the I.C.C. was wrong, does not mean that the court of appeals substituted one discretionary decision for another. In the case of "avoidable cost", the issue is one of law and the definition of "avoidable cost"; in the case of the "balancing test", clearly the I.C.C. stated in substance costs were controlling, and I.C.C. did not weigh

[14]ICG also stated the court of appeals decision was contrary to two other decisions, one in the 8th Circuit and the other in the 7th Circuit, (No. 80-2122, 17-18). But there is no inconsistency. Here the court of appeals did not fail to "consider" labor costs; rather, the court of appeals did not view certain costs to be "avoidable" costs.

the benefits and burdens to *both* the carrier and the communities. (Pet., 17a).

The court of appeals referred to the ALJ's difference with the I.C.C. only to support a "searching inquiry" of the record, along with the I.C.C.'s admission that its approach to this area of the law is in a state of confusion. (Pet., 11a n. 4). The court below recognized that it could not affirm the ALJ's decision. (Pet., 17a). The court of appeals did not violate the rulings of *Universal Camera Corp.* v. *L.L.R.B.*, 340 U.S. 474 (1951) or *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Indeed, this Court in *Universal Camera,* recognized a legislative purpose to enhance the status and function of the trial examiner, with the report to be given such probative force as it intrinsically commands, and that the examiners should have high standards of independence and competency. *Universal Camera,* 340 U.S. at 1493, 495.

4. *Balancing of benefits and burdens.* It was not error for the court of appeals to set aside the I.C.C.'s ultimate finding which asserted to balance the burdens/benefits. (Pet., 16a-17a). Such a remand on this issue would be required in any event owing to the "avoidable cost" ruling, for a new balance would need be struck.

The I.C.C. claims this is a "new issue" not raised in petitioners' brief below. (Pet., 15-16). The I.C.C. urges the Supreme Court's rule against reviewing issues not raised below be applied to courts of appeals reviewing agency decisions. (Pet., 16). There is no support for the I.C.C.'s position. First, the matter was raised at oral argument below. Second, the cases relied upon by the I.C.C. are situations of private litigation, rather than agency review proceedings.

The court of appeals properly reviewed the entire record to determine the proper legal standards. (Pet., 10a-11a). In judicial review of agency action, the petitioners only have standing as representatives of the public interest. There are many persons not represented directly in review of this 96-mile abandonment proceeding. The Court stated in *Scripps-Howard Radio* v. *Comm'n*, 316 U.S. 4, 14 (1942):

> "But these private litigants have standing only as representatives of the public interest."

Moreover, the I.C.C. erred in weighing only the burden of continued operation upon ICG against the burden of discontinuance to the public, along with the benefit to ICG of abandonment. (Pet., 47a., 41a). The benefit to the public of continued operation was not measured by the I.C.C. (Pet., 17a). The Court stated that *both* benefits and burdens must be balanced. *Colorado* v. *United States*, 271 U.S. 153, 168 (1926):

> "The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce."

In its petition to the Court, the I.C.C. admits it gives *primary* consideration to whether the line is profitable to the railroad. (Pet., 2). We do not read *Colorado* to tip the scales in such fashion.

The court of appeals did not err in remanding the cause for a proper balancing of the benefits and burdens to both the carrier and the communities upon either abandonment or forced continued operation of the line.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 80-2122 and 81-350

In the Supreme Court of the United States

OCTOBER TERM, 1980

ILLINOIS CENTRAL GULF RAILROAD COMPANY, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

CITY OF CHEROKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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CITY OF CHEROKEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioners contend that the court of appeals erred in setting aside an order of the Interstate Commerce Commission allowing the Illinois Central Gulf Railroad Company to abandon one of its lines. The issue in this case is whether the Commission properly considered certain labor costs to be "avoidable" in authorizing the abandonment.

1. In December 1977, petitioner Illinois Central Gulf Railroad Company (ICG) applied to the Interstate Commerce Commission, pursuant to 49 U.S.C. (Supp. III)

10903, for authority to abandon a 96-mile railroad line between Cherokee, Iowa and Sioux Falls, South Dakota (Pet. App. A-2 to A-3).[1] As required by Commission regulations, ICG submitted data on revenues created by the line and the "avoidable costs" that would be saved by abandonment of the line. 49 C.F.R. 1121.32(d)(1).[2]

The Administrative Law Judge excluded ICG's data for labor costs of enginemen and trainmen, finding that these costs were not "avoidable" (Pet. App. F-10). This conclusion was based on the testimony of a union representative that the collective bargaining agreement with ICG required two crews regularly to remain on the line regardless of whether any train operates on the line (*id.* at A-14 n.7, F-9). Petitioner ICG neither presented evidence to contradict this description of the labor contract nor placed a copy of the collective bargaining agreement into the record (*id.* at F-10). The ALJ therefore concluded that abandonment of the line would not save ICG any of its labor costs. Elimination of these and other costs[3] left ICG with a "paper profit" from the line, which made abandonment inappropriate (*id.* at F-11, F-29 to F-33).

The ICC sitting as a whole rejected the ALJ's conclusion that the labor costs were not "avoidable" (Pet. App. D-3 to

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[1]"Pet. App." refers to the appendix to the petition in 80-2122.

[2]Neither the statute nor the regulations relevant to abandonment define "avoidable costs." A related provision in the statute dealing with subsidies to avoid abandonment defines avoidable costs as "all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line * * * were abandoned." 49 U.S.C. (Supp. III) 10905.

[3]The ALJ also excluded property taxes on the railroad line on the theory that, since ICG had no immediate offers to buy the property, no tax savings would accrue immediately from an abandonment (Pet. App. F-11).

D-7).[4] With regard to ICG's obligations under the collective bargaining agreement, the Commission remarked (*id.* at D-6 n.5):

> [N]o one contends that [the employees] will continue indefinitely to be paid for doing nothing. At most it will be until the local agreement is next negotiated, or in the most extreme imaginable case until these workers reach retirement age. Under even the most ironclad attrition agreement, attrition eventually takes place.

Based on its assessment that the labor costs eventually would be saved, the Commission held that it was permissible to regard them as avoidable costs (*id.* at D-7). Allowing these and other costs[5] to be included in the calculations, the Commission determined that abandonment was appropriate (*id.* at D-12).

A divided panel of the court of appeals reversed (Pet. App. A-1 to A-27). The court remarked that the only evidence in the record regarding the terms of the collective bargaining contract between ICG and the union supported the ALJ's finding that "the wages of two train crews would have to be paid *indefinitely* * * * regardless of whether the Sioux Falls District line were abandoned" (Pet. App. A-14) (emphasis added). The court therefore concluded that these costs could not be considered "avoidable," as that term is defined in 49 U.S.C. (Supp. III) 10905(a)(1) (Pet. App. A-15). Although it also disagreed with the Commission's conclusion that a proper balancing of the private and public

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[4]The case initially was reviewed by a Division of the Commission (Pet. App. E-1 to E-10), which declined to follow the ALJ's recommendation and authorized abandonment of the line (*id.* at E-8). Thereafter, the full Commission granted review.

[5]The Commission also rejected the ALJ's conclusion regarding property taxes. It concluded that ICG would be able to sell the abandoned property within a reasonable period and therefore avoidance of these costs would merely be delayed and not denied (Pet. App. D-8 to D-9).

interests at stake supported abandonment of the line (*id.* at A-16 to A-17), the court recognized that it could not overturn the Commission's judgment on this issue and remanded for further proceedings (*id.* at A-17).[6]

2. The United States does not believe that the decision below merits review by this Court. The decision is based on the factual finding that the contract involved in this case requires ICG to pay wages to workers on the Cherokee-Sioux Falls line "indefinitely," even in the event the line is abandoned. While the Commission almost certainly was correct in concluding that the contract could not really contain such a provision, the railroad failed to submit any evidence into the record before the ALJ on the issue. Thus, the case involves a simple factual difference between the Commission and the court in circumstances where the record is needlessly incomplete. This is not a dispute that requires resolution by this Court.

Once the court of appeals' factual assertion is accepted, it is difficult to quarrel with its conclusion that the labor costs are not "avoidable." If costs would be incurred "indefinitely," regardless of abandonment, then they hardly can be described as "avoidable." The Commission recognized as much in its decision when, in regard to the property tax issue, it described an avoidable cost as one that "can with reasonable certainty be avoided within a reasonable time following abandonment" (Pet. App. D-8). The labor costs as viewed by the court of appeals do not satisfy this test.[7]

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[6]The court of appeals affirmed the Commission's determination that ICG's property taxes are "avoidable" costs (Pet. App. A-12 n.5).

[7]The Commission contends (Pet. 14-15) that the court of appeals' treatment of the property taxes and the labor costs is wholly inconsistent. It is the difference between these issues, however, that demonstrates the narrowness of the court's holding on labor costs. Obviously, the

The unusual factual posture of this case also reduces the potential harm it may cause the Commission in future abandonment cases. Indeed, the Seventh Circuit recently considered the same issue and had no difficulty limiting the Eighth Circuit's decision to its facts. In *International Minerals & Chemical Corp.* v. *ICC*, No. 80-2096 (Aug. 3, 1981), slip op. 8, the Seventh Circuit found that its case presented "no issue about a restrictive collective bargaining agreement" and that "it was only the application of [general] principles to a certain narrow fact situation that caused the controversy in *Cherokee*." The court also remarked that the Eighth Circuit confronted a situation "where wages must be paid pursuant to a collective bargaining agreement regardless of operations over the line, [so] the labor expenses cannot be considered avoidable" (*ibid.*), whereas its case did not "involve such a labor agreement." Slip op. 10. It is doubtful that any other court of appeals will be faced with "such a labor agreement," and therefore it is most unlikely that any other court of appeals will reach the same conclusion as the court below.

This is an unusual case, made so primarily by the railroad's failure to make a complete record before the ALJ. The best solution is for the Commission on remand to reopen the proceedings and allow the development of a

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court must have accepted the Commission's theory that deferral of cost savings for a reasonable period, *i.e.*, the time required to sell the property, is not enough to make costs unavoidable. Thus, if the record had shown that the labor costs would be incurred only for a short period after abandonment, the court presumably would have decided the labor cost issue in the same way as the property tax issue. This seems particularly likely in light of the strong policy arguments advanced by the Commission in support of including labor cost savings that are—as the Commission assumed (but the record did not show)—deferred for only a few years (Pet. App. D-5 to D-6).

more complete record on the labor cost issue. Review by this Court is not required to achieve that result.[8]

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

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[8]The Commission (Pet. 15-17) and ICG (*id.* at 23-27) also complain about the court of appeals' statement regarding the Commission's balancing of the relevant interests. In light of the court's holding on the labor costs issue, however, a remand was required in any event. Thus, there is no independent significance to the court's discussion regarding the proper balance of interests. Although it was perhaps inappropriate for the court to offer these views *sua sponte*, the comments are mere dicta.

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Nos. 80-2122 and 81-350

IN THE

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OCTOBER TERM, 1981

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Interstate Commerce Commission,
Petitioner in No. 81-350,

v.

City of Cherokee, Rock Rapids Community Affairs Corporation, Farmer's Co-Op, Archer Co-Op, Calumet Feed Service, K-F Motors, Metz Baking Company, Ray Halder AGG Lime Service, Rowena Elevator & Mill, L. C. Burkhalter and M. S. Stuckey,
Respondents.

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Respondents.

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 36.1 of the Rules of this Court, the Association of American Railroads ("AAR") hereby files its brief as *amicus curiae* in support of the petitions for a writ of certiorari filed by the Illinois Central Gulf Railroad Company ("ICG") in No. 80-2122 and by the Interstate Commerce Commission ("Commission") in No. 81-350, seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. Written consent of the parties to file this brief has been obtained and is being filed on this date under separate cover with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The Association of American Railroads is a voluntary, unincorporated, non-profit organization composed of member railroad companies operating in the United States, Canada, and Mexico.[1] The Class I member railroads operate 92 percent of the total trackage, employ 94 percent of the workers, and generate approximately 97 percent of the total freight revenues of all railroads in the United States. In addition to the Class I railroads, the AAR represents the interests of several hundred smaller railroads, terminal companies and switching lines.

The activities of the AAR include research, operations, car service, safety, public relations, accounting, statistics, law, and federal legislation and regulation, insofar as those matters require joint handling in the interest of safe, adequate and efficient railroad service to the public. The AAR is a joint representative and agent of its member railroads in connection with federal legislation, regulation, and legal matters of common concern to the rail industry as a whole. It has an interest in significant interpretations of federal legislation or agency regulations that will apply generally to all of its members.

The issues raised in the present case by ICG and by the Commission are of very great importance to the members of the AAR. Many of the members operate lines as to which they have applied, or plan to apply in the future, for authority to abandon. As will be described *infra*, the rejection of the Commission's cost calculations and determination of the "public convenience and necessity" by the majority opinion of the Court of Appeals is not only erroneous, but also poses a serious threat to the financial health and viability of many of the Nation's railroads, most of which are already in poor financial health, by making abandonments vir-

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[1]The members of the AAR are listed in the Appendix to this brief.

tually impossible in the future.[2] If allowed to stand, the majority opinion would frustrate the goal of the railroads (and of Congress, as set forth in the Interstate Commerce Act) of achieving an adequate rail transportation system in the United States.

SUMMARY OF ARGUMENT

The AAR agrees with the Illinois Central Gulf Railroad Company and the Interstate Commerce Commission that this case raises several important questions warranting review by this Court.

First, if allowed to stand, the majority opinion of the Court of Appeals would undermine many of the important provisions and

[2]The Commission has found on many occasions that the financial condition of the Nation's railroads as a whole is extremely poor. For example, when it permitted a general rate increase proposed by the railroads to take effect in July 1980, the Commission found that the railroads had been earning inadequate revenues. The traditional (unadjusted for taxes) rates of return on investment of the railroads as a group were 1.7 percent in 1977 and 1978, and 3.0 percent in 1979 (5.1 percent if Conrail were excluded). The tax-adjusted rates of return were 1.1 percent in 1977 and 2.10 percent in 1979 (4.3 percent if Conrail were excluded). During this period, railroads in the East showed a composite deficit. Even after the Commission permitted the July 1980 general increase, the railroads' tax adjusted rate of return on investment was only 4.05 percent—far below the 11 percent figure which the Commission had then determined to be the minimum adequate rate—and the Eastern railroads continued to operate at a deficit. *See* Ex Parte No. 375 (Sub-No. 1), *Increased Freight Rates and Charges 1980—Nationwide—Phase II* (Commission decision served July 3, 1980).

In March 1981, the Commission determined that 11.7 percent was the minimum rate of return on investment necessary for a railroad to earn adequate revenues within the meaning of the new Rule of Ratemaking for Railroads, 49 U.S.C. §10704(a)(2) (which requires the Commission to maintain necessary standards and procedures for establishing revenue levels for rail carriers adequate to cover total operating expenses, including depreciation and obsolescence, plus a reasonable return on capital). The Commission further found that only 3 of 35 Class I railroads whose records it examined earned adequate revenues under this standard. *See Standards For Railroad Revenue Adequacy*, 364 I.C.C. 803 (1981).

purposes of the Interstate Commerce Act. The majority opinion wrongly excludes labor costs—a substantial portion of the cost of service over a rail line—from the Interstate Commerce Commission's consideration of where the public convenience and necessity lies. By so holding, the majority opinion seriously impairs the discretion and powers of the Commission in abandonment cases and poses a serious threat to the financial viability of the Nation's railroads, which as a whole are already in anemic financial condition. Because of the large number of collective bargaining agreements between railroads and labor unions, the decision of the Court of Appeals that the crew wages at issue are not "avoidable costs" (due to the alleged provisions of the collective bargaining agreement), and that such wages may therefore not be considered as expenses by the Commission in determining whether a line is profitable, would virtually compel the Commission to deny applications for abandonment of many lines which are, in economic reality, unprofitable. Prevention of abandonments on the basis of such a rigid interpretation of the avoidable cost concept would prevent the Commission from determining abandonment applications on the basis of the "public convenience and necessity," as Congress required in the Interstate Commerce Act. In addition, the majority opinion's approach of substituting its views of the public convenience and necessity for that of the Commission (whose analysis the majority opinion distorted or refused to acknowledge) effectively divests the Commission of its final and exclusive authority in abandonment cases by making the Commission's determination of the public convenience and necessity a matter for judicial redecision—contrary to prior holdings of this Court.

The majority opinion of the Court of Appeals also poses a serious threat to the national policy (reflected in Section 10903(b) of the Interstate Commerce Act) of encouraging agreements between railroads and unions for the protection of workers affected by abandonments. By ruling that the wage payments at issue are not avoidable costs because of the alleged existence of such an

agreement, the majority opinion of the Court of Appeals would tend to deter railroads from entering into any such agreements in the future.

Second, the majority opinion decision of the Court of Appeals for the Eighth Circuit is in fundamental conflict with prior decisions of the courts of appeals allowing the Commission to take an economically realistic view of railroad costs in abandonment cases. The majority opinion is inconsistent with the recent decision of the Court of Appeals for the Seventh Circuit in *International Minerals & Chemical Corp.* v. *ICC*, ___ F.2d ___ (Nos. 80-2096 and 80-2097) (August 3, 1981), which upheld a Commission determination that certain crew wages were avoidable costs. In both the *City of Cherokee* and *International Minerals* cases, opponents of abandonment had argued that certain wages were not avoidable costs because the railroad would continue to employ the workers and pay them following abandonment. The Eighth Circuit erroneously agreed with this contention; the Seventh Circuit correctly rejected it, upholding the reasoning of the very Commission decision which was reversed by the Court of Appeals for the Eighth Circuit. Furthermore, the majority opinion's holding that a railroad expense may not be considered by the Commission in its determination of the profitability of a line if the expense cannot be avoided *immediately* upon abandonment is contrary to prior decisions of the courts of appeals which have held that the opportunity cost of a line may be taken into consideration by the Commission.

Third, the approach of the Court of Appeals in reviewing the agency decision was fundamentally improper. In reversing the Commission's determination that certain crew wages constituted avoidable costs, the Court of Appeals based its decision on a clearly erroneous characterization of the Commission's analysis. The Court of Appeals also acted inconsistently in holding that ICG's property taxes on the line were avoidable costs, while the crew wages—which, like property taxes, could not be eliminated

immediately upon abandonment—were not. Furthermore, by comparing the decisions of the Commission and the ALJ whose recommendations it rejected, the Court of Appeals applied a standard of review plainly forbidden by this Court in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). Finally, the Court of Appeals acted arbitrarily and capriciously in reaching out and deciding an issue which *none* of the parties before that court had raised.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals Is Contrary to the Provisions of, and Policies Underlying, the Interstate Commerce Act

Under the Interstate Commerce Act, a railroad line may be abandoned if such abandonment is required or permitted by the present or future public convenience and necessity (49 U.S.C. §10903(a)). Congress intended that the determination of the "public convenience and necessity" be made *exclusively* by the Interstate Commerce Commission. The abandonment provisions of the Interstate Commerce Act were intended to establish a means for railroads, subject to Commission approval, to divest themselves of unprofitable lines and thereby facilitate the provision of adequate rail service to the public. The decision of the majority of the Court of Appeals is directly contrary to this central purpose.

The abandonment provisions of the Interstate Commerce Act were originally enacted by Congress in Section 402 of the Transportation Act of 1920 (41 Stat. 456, 477). This Court recognized shortly after the passage of the Act, and in subsequent cases, that Congress intended to vest exclusively in the Commission the responsibility for determining whether the public convenience and

necessity permitted an abandonment.[3] The Court also recognized that the ultimate goal of the abandonment provisions was the achievement of adequate rail service to the public. Prior to the enactment of the 1920 Act, many railroads had been on the brink of financial ruin because of the necessity of operating uneconomical or superfluous lines. By providing a means for railroads to free themselves of such lines, the statutory scheme removed an obstruction that might otherwise prevent railroads from performing their statutory duty as common carriers. As a result, interstate commerce would be protected from undue burdens. *E.g.*, *City of Yonkers* v. *United States*, 320 U.S. 685, 690 (1944); *Transit Commission* v. *United States*, 289 U.S. 121, 128 (1933); *Texas & N.O. R.R.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479 (1928).

The purposes underlying the abandonment provisions of the Interstate Commerce Act have not changed since their original enactment in 1920, although the provisions themselves have been modified. Indeed, the modifications that have been made have been intended to promote those purposes by further facilitating abandonments. In response to the financial crisis of major railroads in the Northeast and Midwest regions in the late 1960's and early 1970's, Congress passed the Regional Rail Reorganization Act of 1973, which facilitated abandonments of unprofitable lines by these railroads. When it became apparent that the financial problems of railroads were nationwide rather than regional, Congress passed the Railroad Revitalization and Regulatory Reform Act of 1976, which sought to accomplish on a national scale what the 1973 Act had sought to accomplish in a particular region. *See, e.g.*, *Southeastern Pennsylvania Transportation Authority* v. *ICC*, 644 F.2d 238, 240-43 (3d Cir. 1981). In the

[3] *See, e.g.*, *Transit Commission* v. *United States*, 289 U.S. 121, 128 (1933); *Colorado* v. *United States*, 271 U.S. 153, 162-68 (1926); *Railroad Commission of California* v. *Southern Pacific Co.*, 264 U.S. 341, 348 (1924); *Dayton-Goose Creek Ry.* v. *United States*, 263 U.S. 456, 478 (1924); *Texas* v. *Eastern Texas R. R.*, 258 U.S. 204, 213 (1922).

Staggers Rail Act of 1980, Congress again attempted to facilitate abandonments by limiting the duration of Commission investigations of abandonment applications in order to protect railroads from unnecessarily protracted proceedings. *H. Rep. No.* 96-1430, 96th Cong., 2d Sess. 125 (1980).

Thus, since 1920, the Congress has entrusted to the Commission the exclusive responsibility for determining whether the "public convenience and necessity" requires or permits an abandonment. In making that determination, the Commission must balance the benefit of abandonment to the railroad against the inconvenience which abandonment would cause to shippers and communities served by the line. *Colorado* v. *United States*, 271 U.S. 153, 168-69 (1926). One factor in the Commission's balancing analysis is the profitability of the line, which the Commission has determined through the use of the concept of "avoidable costs." Normally, if operations over the line are so costly as to impair railroad service on other branches, abandonment is permitted. However, even a profitable line may be abandoned if the earnings on the line are inadequate.[4]

[4] *See, e.g., Purcell* v. *United States*, 315 U.S. 381 (1942). As was held by a three-judge court in *Commonwealth of Pennsylvania* v. *United States*, 361 F.Supp. 208, 219 (M.D. Pa.), *aff'd on appeal*, 414 U.S. 1017 (1973):

> "Although it is true a minimally profitable line may impose but a slight burden on an overall railroad, even that slight burden may outweigh the local interest in maintenance of the line. The burden of a minimally profitable line exists because of the nature of the regulated railroad industry. Until a certificate of abandonment is granted, a railroad is required to provide services on its tracks. To provide these services, expenditures will be required to maintain the line in operating condition. Expenditures used on this line will not be available for maintenance of other more profitable lines. It is thus possible for a railroad, limited in its ability to finance track rehabilitation and improvements, to be hindered in its provision of more essential service on other lines by the need to maintain minimally profitable lines. A burden on other commerce may be pres-

(Footnote continued on following page.)

The decision of the Court of Appeals is flatly inconsistent with the provisions and underlying purposes of the abandonment section of the Interstate Commerce Act in several respects.

First, the majority's ruling that the Commission may not consider wages in analyzing the profitability of the line in question is wholly unrealistic. Labor costs form a substantial part of a railroad's costs of service. Where (as was the case in *City of Cherokee*) these labor services are performed *solely* in connection with the operation of the line, the Commission must be permitted to take the cost of such services into account in determining what the "public convenience and necessity" requires or permits. By ruling to the contrary, the majority decision of the Court of Appeals will result in the denial of a large number of meritorious abandonment applications, because essentially the same factual circumstances present in *City of Cherokee* are certain to be present in many future abandonment cases. As the Commission stated in its petition for certiorari, many railroads have made agreements with labor unions protecting workers from discharge upon abandonment. There was no dispute in the *City of Cherokee* case that if the wages in question were included as part of the avoidable costs, the line in question would have shown a loss, rather than the "profit" which resulted after the exclusion of wage expenses on the basis of an alleged collective bargaining agreement. Instead, as a result of that exclusion by the ALJ (which the majority opinion of the Court of Appeals affirmed), the railroad showed a "paper," or imaginary, profit. This ostensible profitability was a critically important factor in the recommendation of the ALJ (which the Commission rejected) that the application for abandonment be denied. The approach and reasoning of the ALJ and the majority of the Court of Appeals will undoubtedly lead to the same result

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(Footnote continued from previous page.)

ent, therefore, in maintaining even a profitable line. It is therefore unreasonable for the plaintiffs to assume the I.C.C. must always turn down applications for abandonment of profitable lines."

in many future abandonment cases if the majority opinion of the Court of Appeals is allowed to stand.

Indeed, the *City of Cherokee* decision has *already* resulted in the denial of abandonment applications where, in reliance on the Eighth Circuit's majority opinion, administrative law judges of the Commission have ruled that certain wages are *not* avoidable costs, thus producing an imaginary "profit" on lines that are in fact unprofitable.[5] In each instance, certain wages were excluded on the grounds that the railroad was obligated to pay those wages even after abandonment, and the applications for abandonment

[5]In Docket No. AB-43 (Sub-No. 58), *Illinois Central Gulf Railroad Co.—Abandonment Near Rosedale and Greenville in Washington and Bolivar Counties, MS* (decision served April 15, 1981), an ALJ ruled that crew wages were not avoidable costs because a union witness had testified that the employees would be transferred to another line following abandonment. Because of this exclusion (which the ALJ based on the *City of Cherokee* decision), the recomputed revenues and avoidable costs of the line were equal, whereas under the railroad's cost calculations the avoidable costs had exceeded revenues by $107,000 (*id.* at 5-6, 21-22).

Similarly, in Docket No. AB-43 (Sub-No. 71F), *Illinois Central Gulf Railroad Company—Abandonment—Between Columbia and Silver Creek, MS* (decision served June 4, 1981), an ALJ relied on *City of Cherokee* in ruling that part or all of the wages for enginemen, trainmen, and station employees were not avoidable costs because: (1) the engineers would be "bumped back" to firemen or placed on the engineer's extra board pursuant to a union agreement; (2) any trainmen jobs eliminated would be at the extra board level; (3) station employees would continue to work for the railroad after abandonment. As a result of these exclusions, avoidable costs were reduced by $150,000, and revenues then exceeded avoidable costs by $59,000. Under the railroad's original computations, avoidable costs had exceeded revenues by $126,000 (*id.* at 10-12, App. A-C).

Finally, an ALJ ruled in a case decided in May 1981 that, as a result of *City of Cherokee*, crew wages were not "avoidable costs" if the railroad planned to assign the crews to other parts of the rail system following abandonment (ICG's Petition for Certiorari, at 23 n.23). *See* Docket No. AB-18 (Sub-No. 35F), *Chesapeake and Ohio Railway Company—Abandonment—Near South Haven and Hartford in Van Buren County, Michigan* (decision served May 14, 1981, at 5, 7).

were denied. Continuation of this trend would be financially disastrous for the railroads of the nation, which as a whole are already in serious financial condition.

Second, the Court of Appeals has effectively divested the Commission of its final and exclusive authority in abandonment cases. The majority opinion distorts the analysis of the Commission, accusing the Commission of stating only that it will allow abandonments when the carrier cannot operate the line as a profitable going concern and can turn a greater profit through abandoning the line and selling its property holdings. In reality, as ICG and the Commission demonstrated in their petitions, the Commission and Division 1 (whose findings the Commission adopted by reference) balanced the needs of shippers and communities against those of the railroad. By embracing the ALJ's cost and balancing analysis, the majority opinion, in effect, holds that an abandonment is inconsistent with the "public convenience and necessity" whenever revenues exceed avoidable costs (though not total costs) and the railroad cannot prove that it cannot recapture lost traffic and that the funds to be saved from abandonment will be devoted only to rail-related purposes. By thus substituting its concept of the "public convenience and necessity" for that of the Commission, the Court of Appeals has—contrary to prior rulings of this Court—made the Commission's balancing of the interests of the railroads and shippers a "matter for judicial redecision." *See, e.g., Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, ___ U.S. ___, 101 S.Ct. 1124, 1132 (1981); *Purcell* v. *United States*, 315 U.S. 381, 384 (1942).[6]

Furthermore, the majority opinion severely restricts the scope of the "public convenience and necessity" standard by elevating two factors—avoidable costs and labor protection agreements—to a degree of importance totally inconsistent with the Interstate Commerce Act and prior decisions of this Court. The statutory standard to be applied by the Commission is the "public conve-

[6] *See also Mississippi Public Service Commission* v. *ICC*, 650 F.2d 551 (5th Cir. 1981).

nience and necessity" (49 U.S.C. § 10903(a)). The term "avoidable costs" does not appear in this section of the Act. As ICG stated in its petition for certiorari, the concept of "avoidable costs" is but one factor which the Commission considers in abandonment proceedings. It has *not* been the governing factor, because Congress intended the public convenience and necessity—not profitability—to be the standard in abandonment cases.[7] Indeed, as shown *supra*, the Commission has approved abandonments even when the line is profitable. The majority opinion, however, has made the avoidable cost concept the governing factor in abandonment cases.

Similarly, by holding that a prior labor agreement may result in the denial of an abandonment application, the majority opinion of the Court of Appeals would effectively convert future abandonment proceedings into breach-of-contract actions whenever the railroad and the union have made such an agreement. This would be totally contrary to a long line of cases holding that an abandonment application cannot be denied on the basis of a private contract[8] and that the Commission has no power to interpret contracts.[9]

Finally, the majority opinion of the Court of Appeals is contrary to the Interstate Commerce Act's policy of encouraging agreements between railroads and unions for the protection of workers upon abandonments. As it stated in its decision, the Commission has always encouraged the making of such agreements. Indeed, Section 10903(b)(2) of the Interstate Commerce Act, 49

[7]As ICG stated in its petition for certiorari, the fact that the revenues earned by a particular line exceed avoidable costs does not necessarily mean that the line is profitable.

[8]*See, e.g., Colorado* v. *United States*, 271 U.S. 153, 166-67 (1926), and other cases listed in ICG's Petition for Certiorari, at 19 n.17.

[9]*See, e.g., Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382, 391 (1932); *Gulf, M. & N.R.R. Co.* v. *Illinois Cent. R.R.*, 21 F. Supp. 282, 290-91 (W.D. Tenn. 1937), *appeal dismissed*, 109 F.2d 1016 (6th Cir. 1940).

U.S.C. §10903(b)(2), *requires* the Commission to include in each certificate "provisions to protect the interests of employees." However, the decision of the Court of Appeals would effectively frustrate those policies. By ruling that the existence of an alleged protective agreement rendered the wages in question *un*avoidable costs, thereby creating an imaginary profit for the line and resulting in the denial of the abandonment application, the majority decision of the Court of Appeals will discourage railroads from voluntarily making such agreements in the future.

II. The Decision of the Court of Appeals Is Fundamentally Inconsistent With Decisions of Other Courts of Appeals

The majority opinion of the Court of Appeals is in direct conflict with prior decisions of courts of appeals holding that in abandonment cases the Commission is entitled to take an economically realistic view in determining what costs are to be considered in the calculation of the profit or loss of a line. Realizing that the Commission's determination is an important factor in its assessment of the "public convenience and necessity"—which Congress did not intend to be a "matter for judicial redecision"—these courts have deferred to the Commission's judgment. They have also rejected the contention that a cost may not be considered unless it will be avoided or eliminated *immediately* upon abandonment of the line. By contrast, the majority opinion in *City of Cherokee* imposes on the Commission a narrow view of the costs of a rail line, preventing the Commission from making a complete assessment of the economic situation of the line.

The approach of the majority of the panel of the Eighth Circuit in this respect is directly inconsistent with that of the Court of Appeals for the Seventh Circuit in *International Minerals & Chemical Corp.* v. *ICC*, ___ F.2d ___ (Nos. 80-2096 and 80-2097) (August 3, 1981). There, the Norfolk and Western Railway Company ("N&W") had filed an application to abandon

two branches of its rail network. Although the N&W had contended that the two branches were unprofitable, the ALJ who conducted the hearing on the abandonment application found that certain labor costs included in the N&W's calculation should be excluded because the employees were paid for work done not only on the two branches, but on other lines as well. Because the employees would continue to work on the other lines even after abandonment, the ALJ reasoned, the costs were jointly shared with other lines and were therefore not "avoidable." After excluding these costs, the ALJ found that the lines were sufficiently profitable and recommended that the applications be denied (slip opinion, at 2-3, 6). The full Commission, however, reversed the ALJ, ruling that the costs *were* avoidable and granting the application. The Commission based its avoidable cost ruling on *Illinois Central Gulf Company Railroad Abandonment*, 363 I.C.C. 93 (1980)—the very decision *reversed* by the majority of the Court of Appeals in *City of Cherokee.*

A panel of the Court of Appeals for the Seventh Circuit unanimously *affirmed* the Commission's ruling that the wages were avoidable costs (slip op. at 6-10). The court agreed with the Commission that a joint cost situation did not exist in the case. The Commission had stated in its *Illinois Central Gulf* decision that a true joint cost situation existed where two services ran over the same line, and only one of the services was eliminated (slip op. at 6-7). Here, no other railroad would be operating over the line upon abandonment. The employees would be freed upon abandonment for productive work elsewhere in the N&W network—work that "otherwise might require the hiring of new personnel or the payment of overtime or premium wages" (*id*).

The Court of Appeals for the Seventh Circuit further ruled in *International Minerals* that the Commission had *not* erred in relying on its prior *Illinois Central Gulf* decision, and in ruling that the labor costs were avoidable. Although the Seventh Circuit recognized that the opinion on which the Commission had relied

had been reversed upon judicial review, it distinguished the decision of the Court of Appeals for the Eighth Circuit as involving a labor agreement which was not a factor in N&W's case (slip op. at 7-8). The court stated that the principles underlying the Commission's *Illinois Central Gulf* decision were sound and that "the decision on whether or not employee transfers in fact will result in savings to the railroad is one for the ICC, not this Court" (slip op. at 10).[10]

Although the Court of Appeals for the Seventh Circuit in *International Minerals* distinguished the *City of Cherokee* decision as one involving a labor agreement, a careful reading of the Seventh Circuit's decision leaves no doubt that the reasoning of the two courts is in fundamental conflict. In both cases, opponents of abandonment had alleged that the wages in question were not avoidable costs because the railroad would continue to pay them following abandonment. Unless a particular cost could be eliminated immediately upon abandonment, they argued, it was not "avoidable." The Eighth Circuit agreed with this contention; the Seventh Circuit disagreed, recognizing that costs were avoidable

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[10]The deference accorded to the Commission's definition of the wages in question as avoidable costs by the Court of Appeals for the Seventh Circuit in *International Minerals* was well-founded. This Court has ruled that the Commission's determination of the public convenience and necessity—a determination in which the avoidable cost concept plays a part—is to be accorded considerable deference. *See, e.g., Chicago and North Western Transportation Co.* v. *Kalo Brick & Tile Co., supra*, 101 S.Ct. at 1132. Moreover, "avoidable cost is a 'word of art' unique to the railroad industry and is therefore virtually unheard of in economic literature." J. Price & F. Berardino, *Defining Economic Terms Used in the Railroad Revitalization and Regulatory Reform Act*, 9 Transp. L. J. 133, 154 n.39 (1977). Thus, when the Commission interprets its abandonment regulations—which classify wages for train and engine crews as avoidable costs—the substantial deference traditionally accorded to such interpretations should be, if anything, even greater because of the uniqueness of the avoidable cost concept and the Commission's experience in the area. *See* 49 C.F.R. §§1121.32(d), 1121.42(c)(1)-(2), 1121.46; *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

as long as they would *eventually* be eliminated as a result of abandonment."

As Illinois Central Gulf has noted in its petition for certiorari, the majority opinion in *City of Cherokee* is also contrary to two cases which have held that the Commission may take opportunity costs into account in the determination of the profitability of a line. *See Farmland Industries, Inc.* v. *United States*, 642 F.2d 208 (7th Cir. 1981); *Missouri Pacific R.R.* v. *United States*, 625 F.2d 178 (8th Cir. 1980). Like *International Minerals*, these cases recognize that the Commission is entitled to take a realistic view of the economic and financial situation of a rail line in abandonment cases. Furthermore, they reject the holding of the majority in *City of Cherokee* that the inability of a railroad to eliminate a particular cost *immediately* upon abandonment dictates exclusion of such costs from the Commission's considerations. These cases recognize, as did this Court in *Colorado* v. *United States*, 271 U.S. 153, 165-69 (1926), that the Commission is entitled—indeed, *required*—to consider *all* possible relevant factors in abandonment proceedings.

"Although the Court of Appeals for the Seventh Circuit affirmed the Commission's determination of the avoidable cost issue as a whole, it did remand the case to the Commission to determine whether maintenance and labor crew expenses on a portion of one of the lines were avoidable costs. That portion was also utilized by Conrail pursuant to a trackage rights agreement, and the evidence indicated that Conrail would be allowed to operate on the track even if N&W's abandonment application were approved. Because the record did not indicate whether the wages attributable to that portion were included in the Commission's computation of avoidable labor costs, the case was remanded to the Commission for a decision on whether a readjustment of such costs (if one was necessary) affected the Commission's prior decision to grant the application (slip op. at 10). In so acting, the court was simply adhering to the Commission's definition of "joint costs." If the N&W and Conrail served a portion of a given line, and Conrail would continue to operate on the line after N&W's abandonment, the wages attributable to that portion would be joint costs and therefore not avoidable.

Because of the conflict between the *City of Cherokee* decision on the one hand and the decisions in *International Minerals*, *Farmland Industries*, and *Missouri Pacific* on the other, this Court should issue a writ of certiorari.

III. The Decision of the Court of Appeals Has So Far Departed From the Accepted and Usual Course of Judicial Review of Agency Decisions As To Call For Exercise of This Court's Power of Supervision

As the Commission and the ICG have stated in their petitions for certiorari, in reviewing the Commission's decision in this case, the Court of Appeals has made obvious and fundamental errors which should not be allowed to stand. In the first place, the court's rejection of the Commission's treatment of avoidable costs was based on a total mischaracterization of the decision of the Commission. Although the majority opinion of the Court of Appeals asserted that the Commission equated avoidable costs with joint costs, precisely the *opposite* is true, as a reading of the Commission's decision demonstrates. As the Court of Appeals for the Seventh Circuit found in *International Minerals*, the Commission stated that the concept of avoidable costs is *in opposition to* the concept of joint costs (slip op. at 6-7).

Second, the Court of Appeals was inconsistent in upholding the Commission's determination that property taxes of the railroad constituted avoidable costs, while ruling that the crew wages did not. In both cases, the cost would be "avoided" *ultimately*, although not *immediately*, as a result of abandonment. The Court of Appeals had no rational basis for treating the two costs differently.

Third, the court's comparison of the decisions of the Commission and the ALJ to determine which was preferable in its determinations of the wage issue and of the "public convenience and necessity" was plainly improper under the holdings of this Court

in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), and *FCC* v. *Allentown Broadcasting Corp.*, 349 U.S. 358 (1955). In those cases, this Court ruled that an appellate court is to review only the *agency's* decision to determine whether it is supported by reasoned analysis and whether the findings of the agency are supported by the record. *Universal Camera* and *Allentown* hold that, although the reviewing court may take into account the findings and opinion of an ALJ when the agency has rejected his recommendation, it may *not* compare the analyses of the ALJ and the agency and determine that one is "better" than the other.

If future courts of appeals may compare and choose between the decisions of the ALJ and the Commission, the Commission will have been divested of its exclusive responsibility for deciding these issues. Should the Commission decide to reject the recommendation of an ALJ (as it did in this case), its opinion may be compared with the ALJ's for "correctness" by an appellate court. To avoid such comparison, the Commission will be under pressure to adopt the recommendation of the ALJ unless it believes the ALJ has committed plain error. In short, the majority decision of the Court of Appeals vests the powers to decide abandonment cases in administrative law judges and the courts of appeals. Not only is this result contrary to the abandonment statutes, but it also contravenes those provisions of the judicial code which state that it is the final decision of *the Commission* that is to be reviewed by the courts of appeals. *See* 28 U.S.C. §§2321(a), 2342.

Finally, the Court of Appeals erred in addressing an issue not raised or briefed by *any* of the parties in the case—the adequacy of the Commission's balancing of the benefit of abandonment to the railroads against the inconvenience that abandonment would cause to shippers and communities served by the line. The Eighth Circuit itself has stated that an issue not raised in a brief will be regarded as abandoned and entitled to no consideration by that court unless the issue is one of public concern or constitutes plain

error on the face of the record which will result in a miscarriage of justice absent review. *See, e.g., Harris* v. *Smith*, 372 F.2d 806 (8th Cir. 1967); *Andrews* v. *Olin Mathieson Corp.*, 334 F.2d 422 (8th Cir. 1964).[12] Nowhere in its decision did the Court of Appeals attempt to justify its consideration of this issue on the basis of any of these exceptions (for it plainly could not). Clearly, the majority of the Court of Appeals acted improperly in reaching this issue, and its approach should be rejected by this Court.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit. Indeed, as the Commission argued in its petition for certiorari, the errors of that judgment and opinion are so plain that the Court should properly consider summary disposition on the merits, pursuant to Rule 23.1.

Respectfully submitted,

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[12]This also appears to be the rule in other courts of appeals. *See, e.g., Kemlon Products & Development Co.* v. *United States*, 646 F.2d 223, 224 (5th Cir. 1981); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 608-09 & n.9 (7th Cir. 1981); *Hernandez* v. *County of Los Angeles*, 624 F.2d 935, 937 & n.2 (9th Cir. 1980).

APPENDIX

Members of the Association of American Railroads

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company
Atlanta & St. Andrews Bay Railway Company

Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Boston and Maine Corporation
    Springfield Terminal Railway
Burlington Northern Railroad Company
    Oregon Electric Railway
    Oregon Trunk Railway
    Walla Walla Valley Railway

Cambria & Indiana Railroad Company
[Canadian Pacific Limited—lines operated in U.S.]:
    Aroostook Valley Railroad
    Canadian Pacific lines in Maine
    Canadian Pacific lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad
      & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
    Washington, Idaho & Montana Railway Company
Clinchfield Railroad Company
Colorado & Southern Railway Company
Consolidated Rail Corporation

Delaware & Hudson Railway Company
    Greenwich & Johnsonville Railway Company

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Detroit & Toledo Shore Line Railroad Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway Company

Galveston, Houston & Henderson Railroad Company
Georgia Railroad
[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:
Grand Trunk Western Railroad Company
Detroit, Toledo & Ironton Railroad Company
Central Vermont Railway, Inc.
Duluth, Winnipeg & Pacific Railway Company

[Canadian National Railways]:
Lines in Michigan
Lines in New England
Lines in New York
Lines in Vermont
Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company
Chicago & Illinois Western Railroad Company
Waterloo Railroad

Kansas City Southern Railway Company
Arkansas & Western Railway Company
Fort Smith & Van Buren Railway Company
Kansas & Missouri Railway & Terminal Company
Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Louisiana & Arkansas Railway Company
Louisville & Nashville Railroad Company
Carrollton Railroad Company

McCloud River Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company

Minneapolis, Northfield & Southern Railway Company
Missouri-Kansas-Texas Railroad Company
including Beaver, Meade & Englewood Railroad Company
Missouri Pacific Railroad Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
New Orleans & Lower Coast Railroad Company
Brownville & Matamoras Bridge Terminal Company
Weatherford Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Norfolk and Western Railway Company
Chesapeake Western Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company

Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern Railway Company
Seaboard Coast Line Railroad Company
Columbia, Newberry and Laurens Railroad Company
Durham & Southern Railway Company
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
San Diego & Arizona Eastern Railway Company
Visalia Electric Railroad Company

Southern Railway System
- Alabama Great Southern Railroad Company
- Algers, Winslow & Western Railway Company
- Atlantic & East Carolina Railway Company
- Camp Lejeune Railway Company
- Central of Georgia Railroad Company
- Cincinnati, New Orleans & Texas Pacific Railway Company
- Georgia Northern Railway Company
- Georgia Southern & Florida Railway Company
- Interstate Railroad Company
- Live Oak Perry & South Georgia Railway Company
- Louisiana & Southern Railway Company
- New Orleans Terminal Company
- Norfolk Southern Railway Company
- St. Johns River Terminal Company
- State University Railroad Company
- Tennessee, Alabama & Georgia Railway Company
- Tennessee Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
- Spokane International Railroad Company
- Mt. Hood Railway Company

Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
- Sacramento Northern Railway Company
- Tidewater Southern Railway Company

Western Railway of Alabama
- Atlanta & West Point Rail Road Company

Winston-Salem Southbound Railway
- High Point, Thomasville & Denton Railroad

Special Canadian and Mexican Member Roads

Canadian Lines (in Canada)
- Algoma Central Railway
- Canadian National Railways

Canadian Pacific Limited
includes Dominion Atlantic Railway and Quebec Central Railway
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway

Mexican Lines (in Mexico)
Chihuahua Pacific Railway Company
[Direccion General de Ferrocarriles en Operation]:
Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

Associate Members

Alaska Railroad (ALASKA)
Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Ann Arbor Railroad System
Apalachiocola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company
Birmingham Southern Railroad Company
British Columbia Hydro & Power Authority (CANADA)
British Columbia Railway (CANADA)
Brooklyn Eastern District Terminal Railroad

California Western Railroad
Chestnut Ridge Railway
Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Chilean State Railways (CHILE, S.A.)
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd. (AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company

Dardanella & Russellville Railroad
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)

Duluth & Northwestern Railroad Company

East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centrao Del Peru Railways (PERU, S.A.)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL, S.A.)
Fruit Growers Express Company

Genessee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad (Itel Rail Corporation)
Hillsdale County Railway Company, Inc.

Japanese National Railways (JAPAN)
Johnstown & Stony Creek Railroad Company

Korean National Railroad (KOREA)

Lake Terminal Railroad Company
LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company

McKeesport Connecting Railroad Company

Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummerstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monogahela Connecting Railroad Company

New Orleans Public Belt Railroad
Newburgh & South Shore Railway Company

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad—National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Quebec, North Shore & Labrador Railway Company (CANADA)

Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company
Roverval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company

San Diego & Arizonia Eastern Transportation Company
Sierra Railroad Company (California)
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A. Minas Railway (BRAZIL)

Wabash Valley Railroad Company
Wabush Lake Railway Ltd. (CANADA)
Warwick Railway Company
Washington Terminal Company
Western Australian Government Railways (AUSTRALIA)

Yancy Railroad Company
Youngstown & Northern Railroad Company